HUD'S 'LEGISLATIVE GUIDEBOOK' AND ITS POTENTIAL IMPACT ON PROPERTY RIGHTS AND SMALL BUSINESSES, INCLUDING MINORITY-OWNED BUSINESSES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

MARCH 7, 2002

Serial No. 67

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://www.house.gov/judiciary

U.S. GOVERNMENT PRINTING OFFICE

78–063 PDF WASHINGTON : 2002

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., WISCONSIN, *Chairman*

HENRY J. HYDE, Illinois
GEORGE W. GEKAS, Pennsylvania
HOWARD COBLE, North Carolina
LAMAR SMITH, Texas
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
ED BRYANT, Tennessee
STEVE CHABOT, Ohio
BOB BARR, Georgia
WILLIAM L. JENKINS, Tennessee
CHRIS CANNON, Utah
LINDSEY O. GRAHAM, South Carolina
SPENCER BACHUS, Alabama
JOHN N. HOSTETTLER, Indiana
MARK GREEN, Wisconsin
RIC KELLER, Florida
DARRELL E. ISSA, California
MELISSA A. HART, Pennsylvania
JEFF FLAKE, Arizona
MIKE PENCE, Indiana

JOHN CONYERS, JR., Michigan
BARNEY FRANK, Massachusetts
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
TAMMY BALDWIN, Wisconsin
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California

PHILIP G. KIKO, *Chief of Staff-General Counsel*
PERRY H. APELBAUM, *Minority Chief Counsel*

SUBCOMMITTEE ON THE CONSTITUTION

STEVE CHABOT, Ohio, *Chairman*

WILLIAM L. JENKINS, Tennessee
LINDSEY O. GRAHAM, South Carolina
SPENCER BACHUS, Alabama
JOHN N. HOSTETTLER, Indiana
MELISSA A. HART, Pennsylvania, *Vice Chair*
LAMAR SMITH, Texas
[VACANCY]

JERROLD NADLER, New York
BARNEY FRANK, Massachusetts
JOHN CONYERS, JR., Michigan
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina

BRADLEY S. CLANTON, *Chief Counsel*
PAUL B. TAYLOR, *Counsel*
CRYSTAL M. ROBERTS, *Counsel*
KRISTINE SCHULTZ, *Full Committee Counsel*
DAVID LACHMANN, *Minority Professional Staff Member*

CONTENTS

MARCH 7, 2002

OPENING STATEMENT

WITNESSES

APPENDIX

MATERIAL SUBMITTED FOR THE RECORD

HUD'S 'LEGISLATIVE GUIDEBOOK' AND ITS POTENTIAL IMPACT ON PROPERTY RIGHTS AND SMALL BUSINESSES, INCLUDING MINORITY-OWNED BUSINESSES

THURSDAY, MARCH 7, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 1:10 p.m., in Room 2141, Rayburn House Office Building, Hon. Steve Chabot [Chairman of the Subcommittee] presiding.

Mr. CHABOT. The Committee will come to order. This is the Subcommittee on the Constitution of the Judiciary Committee. I'm Steve Chabot, the Chairman.

Apparently a number of my Democratic colleagues have been called to the White House, and our last vote on the floor has occurred for the day, so I'm not sure that there are going to be a huge number of Members here. But the rules indicate that we can't start until we have two Members. We now have two Members here, so I apologize for not starting a little more promptly.

The topic of today's hearing is HUD's legislative guidebook and its potential impact on property rights and small businesses, including minority-owned businesses.

The "Growing Smart Legislative Guidebook" is a collection of commentary and proposed state legislation that would comprehensively revise the Nation's land use planning laws. It's the result of a 7-year effort by Department of Housing and Urban Development, using $2 million of taxpayer money.

Under the contract between HUD and the American Planning Association, the guidebook is considered official Federal Government work product. The contract states that HUD could have disapproved the guidebook if its methodology or analysis were found faulty, but HUD did not so disapprove. HUD also did not exercise its right to have dissenting views attached to the guidebook, addressing disagreement with the proposed legislative solutions, or to point out errors in the methodology on which any of the guidebook's conclusions are based.

Many in the regulated community—including those in the landowning, agricultural, minority, small business, and manufacturing communities—have vociferously objected to the proposals contained in the guidebook. Organizations signing letters expressing their concerns regarding the guidebook include the National Black

Chamber of Commerce, the Small Business Survival Committee, the Islamic Institute, the Chamber of Commerce, and the National Association of Manufacturers, among others.

Such organizations point out that only one representative of the regulated community, compared to 29 other representatives representing the regulating community, was allowed to serve on the directorate that engaged in the official deliberations that resulted in the guidebook. Consequently, they argue that the lack of representation during the 7-year project is a fundamental methodological error that taints the guidebook's proposals and conclusions. And for that reason alone, HUD should have delayed its approval of the guidebook or, at least, insisted on its right to include dissenting views.

In exercising its oversight role, Congress should be especially vigilant when the executive branch contracts out to potentially interested parties the job of drafting legislative proposals.

Our hearing today provides an opportunity for Members to hear the concerns of those who were not represented during deliberations on the guidebook but who will be severely impacted by many of its proposals and provisions, should they become law.

Many of these provisions may well result in disparate racial impacts and unreasonably burden property rights. For example, a report by a researcher at the Fletcher School of Law and Diplomacy concluded that: "Black households living in sprawled metropolitan areas live in larger housing units and are more likely to own a home than identical black households in less sprawled areas."

Further, many argue that a sound land use planning program should foster decentralized programs that center on local control rather than centralized programs directed at the State or regional level, because localities should be allowed to use their better understanding of local conditions to provide local citizens with the best available quality of life. Yet, under the legislation proposed in the guidebook, local governments would be required to write plans that follow State goals even if local residents do not agree with those goals and plans.

As a former local official, having served both as a Hamilton County commissioner in my community and also as a Cincinnati City councilman, I have serious concerns about this approach.

Finally, the guidebook expressly authorizes local governments to regulate the location, period of display, size, height, spacing, movement, and aesthetic features of signs, including the locations at which signs may and may not be placed. These provisions in part take aim at on-premise signs that identify a place of business or advertise the product and services available, allowing government, after a period of time, to force the removal of signs from a business. This raises the unsettling and possibly unconstitutional possibility that a small business, who frequently depend on signs for their livelihood, would have no right to tell people what they—even that they exist.

I'd like to close by welcoming all our witnesses here today; in particular, Robert Manley, from Cincinnati in my district. I know from personal experience and from reading Bob's testimony that we both agree on the need to promote balanced development that offers consumer choice, gives families an opportunity to buy their

first home at an affordable price, and is consistent with a local community's vision and values.

Bob, it's good to have you here today. And as we have the opportunity to hear from some of those who are concerned about the guidebook's recommendations, we'll also be interested to learn more about the guidebook's drafting process and APA's views.

And normally, we would now defer to the Ranking Member of the Committee, but as I mentioned, the Ranking Member is at the White House, so that won't be given.

Would the gentlelady from Pennsylvania like to make an opening statement of any sort?

Ms. HART. No, thank you, Mr. Chairman.

Mr. CHABOT. Okay, if not, then without further ado, I will introduce the members of the panel who will be testifying here this afternoon. After the members testify, then Members of the Committee will have an opportunity to ask questions for 5 minutes. And we would ask that the panel try to confine their remarks to within 5 minutes or thereabouts, if at all possible.

We actually have a lighting system, which will go on in just a moment, after I've introduced you. The green light means your 5 minutes is going. A yellow light will come on, and that means you've got a minute to wrap up. And the red light means, if possible, try to stop around that time, if at all possible.

We'll hear first today from Harry Alford, the president and CEO of the National Black Chamber of Commerce. After earning top honors as company commander in the Army's Officer Candidate School class, Mr. Alford assumed a variety of key sales and executive positions at Fortune 100 companies and served as the minority-business development point person in Indiana Governor Evan Bayh's administration. Mr. Alford writes weekly business columns and was recently elected to the board of directors of the U.S. Chamber of Commerce. He also serves as a member of the national advisory council of the Small Business Administration. We welcome you here this afternoon.

Next we'll hear from Dr. R. James Claus of Claus Consulting in Sherwood, Oregon. Dr. Clause is a graduate of Stanford University with a Ph.D. from the University of California at Berkley in urban land economics, real estate finance and analysis, and urban geography. He is an urban-rural land use economist who has spent more than 30 years researching the variables that affect land value. He is also the author of "The Value of Signs: A Guide for Property Appraisers, Brokers, Legal Professionals, Sign Users and Municipal Planners." And we welcome you here this afternoon, Mr. Claus.

Our next witness will be Robert Manley of the law firm of Manley, Burke, Fischer & Lipton in Cincinnati, Ohio. Mr. Manley is also an adjunct professor at the University of Cincinnati School of Planning. In his private practice, Mr. Manley's experience includes the representation of developers and units of local governments related to land use development. He is a graduate of Harvard Law School and has completed post-graduate study at the London School of Economics and the Massachusetts Institute of Technology.

Mr. Manley has at the table with him Stuart Meck, a senior planner at the American Planning Association, who will be available to help answer any questions Members may have concerning the guidebook, if needed. And we welcome you here, as I mentioned before, Mr. Manley.

Finally, we hear from Geoffrey William Hymans, senior counsel to the House Republican Caucus of the Washington State House of Representatives, who he advises on land use and transportation issues. Prior to joining the Legislature, Mr. Hymans was an attorney with the Seattle-based law firm of Williams, Kastner & Gibbs, where he specialized in land use issues.

I'd like to thank all of you for being here this afternoon, and I'd ask, as I mentioned before, that you please try to summarize your statements, if at all possible, within about 5 minutes. And your statement will be made part of the permanent record, so if you're written statement will be longer, that will become a part of the official record. And we'll begin here this afternoon with you, Mr. Alford.

STATEMENT OF HARRY ALFORD, PRESIDENT AND CEO, NATIONAL BLACK CHAMBER OF COMMERCE

Mr. ALFORD. Thank you, Mr. Chairman. I really appreciate this——

Mr. CHABOT. I think that mike is not on there.

Mr. ALFORD. I really appreciate this opportunity to speak before you. I won't read my statement; it would take longer than 5 minutes, so I will highlight our position on this.

The National Black Chamber of Commerce is a federation of 201 affiliated chapters in 40 States and eight nations. We have direct reach to about 85,000 black-owned businesses and gladly represent the 880,000 black-owned businesses that exist in the United States.

We support good policy. We try to stop or remove bad policy. My mission here today is to deal with bad policy that is the APA "Legislative Guidebook," thousands of pages of proposed bureaucracy, making the United States one big zoning ordinance law.

There is precedence to this, sir. It was done in the Soviet Union, and I don't believe the United States needs to emulate anything that happened in the Soviet Union. It's anti-freedom, it's anti-choice, it's anti-culture. What would happen to the Chinatowns of today? What would happen to the thriving bodegas in Hispanic communities? The Little Italys? The Greek towns? What would happen to Harlem, Sweet Auburn district in Atlanta, these thriving business communities with big signs and visual presentations, all of which would be out of compliance with what is being proposed by the legislative guidebook.

It's the same mentality as the Fillmore district in San Francisco in the early '60's when the planning gurus decided that the Fillmore district had outlived itself. They destroyed with bulldozers the black business district of San Francisco. They also destroyed the black middle-class of San Francisco. Today the effects still linger.

In San Francisco, the majority of African-Americans live under the poverty level and in public housing. It's a national disgrace, and it was caused by planning, faulty planning.

Indianapolis has rigid zoning laws. To change a zone, you have to go before the zoning committee. Washington, D.C., has liberal laws, whereas there's a lot of multi-use in the zoning ordinances of Washington, D.C. Houston is rock-n-roll; there's no zoning laws. Do what you want in Houston; the bigger the better.

All three work. All three work. It depends on the area. The decisions should be made locally, not up to a State, not up to a Federal Government. They all work. But they want to wrap it all up into one, march in step to the single beat of the commissar. This is not Americana.

They say we should be pedestrian-driven. Not Over-the-Rhine in Cincinnati. Not at 92nd and Center in Los Angeles. Not at 63rd and Halsted in Chicago. People drive. They take cabs. They take the bus. L-trains. The Metro. You do not stroll through those neighborhoods, going door-to-door, looking into windows. You must have vision from a distance. Your shopping is done with a mission, and it is focused.

Pedestrian-driven won't work. It is misuse of economic development funds, of Federal tax money. They want to fund this with economic development money—economic development money for economic restriction. That is a misappropriation of funds.

They want to cure our problem. What problem? The problem doesn't exist. There is no problem in the way we do business in our communities. They all have different flavors and choices, and all of them bring vitality to the economy. There is no problem.

Did they consult the National Indian Business Association? Did they consult the National Association of Minority Contractors? Did they consult the U.S. Hispanic Chamber of Commerce? The Native American Chamber of Commerce? The Pan-Asian Chamber of Commerce? They certainly didn't consult the National Black Chamber of Commerce. And I think that is why the input, the views, of these communities and these constituencies are absent from this thinking, and it is wrong.

It's a hustle. It's a hustle that won't work. I ask that it not be funded, and it be withdrawn. Thank you, sir.

[The prepared statement of Mr. Alford follows:]

PREPARED STATEMENT OF HARRY C. ALFORD

Mr. Chairman, members of the Committee, thank you for giving the National Black Chamber of Commerce, Inc. time to present testimony concerning this very important issue. The NBCC is a federation of 201 affiliated chapters located in 40 states and eight nations. We have direct access to approximately 85,000 Black-owned businesses and proudly represent the 800,000+ Black-owned businesses located within the United States. Our purpose is to promote entrepreneurship as the main vehicle to wealth building and economic vitality within African-American communities. We believe that the key to prospering in this capitalistic society of ours is to practice capitalism. Practice capitalism via understanding it and excelling in its principles.

We have great concerns about the "Guidebook" of the American Planning Association (APA). Throughout the entire APA document runs a simple and consistent theme: that the proposed regulations will bring about positive benefits. No regard is given to the risk and uncertainty they will bring to the real estate market and related business activities. Furthermore, no understanding is displayed of the consequences of turning this large amount of discretionary authority over to planners—people who, as a whole, possess neither business experience nor a basic understanding of the banking and lending markets. Entry-level businesses will be severely impacted, especially those with the least funding, education, and political

connections. Quite frankly, this will be devastating to the African-American entrepreneur seeking to break free from poverty and achieve the American Dream.

This threat reminds us of when the great Interstate Highway system was put into place throughout this nation. With little thought or foresight, inner city business districts were "eminent domained" into destruction as right of ways for the new freeways. The effects were awesome and can be pointed to as the key reason for the urban blight that was to come within the following decade.

Likewise, *The Legislative Guidebook* is rife with regulations that display little understanding of business and the economy. Let me give you an example. The majority of independent businesspeople typically try to buy, or lease with an option to buy, their own buildings, usually an older building. Often they try to remodel those buildings. According to *The Legislative Guidebook*, those buildings are nonconforming. The way *The Legislative Guidebook* deals with "nonconformity" is all-inclusive. It offers no exceptions. Under the combined impact of Chapters 9 and 10, the process required for an older building to be brought into compliance with the new environmental regulations could create such a delay that for all practical purposes, no one could go into business without constructing a whole new building. If this required compliance process kicks in with every change of business in a nonconforming building, it is extreme enough that it may indeed activate the "takings" clause and result in costly litigation.

All of this, of course, adds delays and problems in the permit process, but delays in and of themselves are not the real problem. The real problem is that this kind of development condition may make it impossible for the first time or beginning entrepreneur, or the person who does not have enough money to buy the business firm or business product franchise and receive franchisor supervision, to find the capital to enter the market; too much risk has been introduced in the market. Furthermore, the government inspections, then re-inspections, then re-examination of its inspections would lead to a level of lending uncertainty and would approach extreme frustration to the point of "prohibition".

The Legislative Guidebook's promotion of amortization and of an oppressive level of supervision of business signage displays a serious lack of understanding of how business functions. The average small business is nearly totally dependant on place-based communication, graphics devices and systems for its marketing and advertising. It is the most cost-effective way a business has of communicating to passing motorists that the business is part of the community, that it offers certain products or services, and that they are welcome to come inside. Signage literally can make or break a small business. The business site of a large corporation or franchise, on the other hand, can be very visible even without a large sign because its national advertising, signature building, prime location, and corporate identification makes it instantly identifiable to the passing motorist.

Advocates of Smart Growth frequently talk of regulations such as those embodied in *The Legislative Guidebook* as being necessary to develop a "sense of place". They opine about limiting "big box retail" and the corporations and franchises that make so many of the newer suburbs indistinguishable from one another. But for all of this talk, one of the biggest things that has favored corporate America from the beginning has been land use planning rules, and especially sign regulations. The more difficult it is for the small businessperson to be seen, and the more risk is introduced into the marketplace for the independent merchant, the more franchises and corporations a town will have and the fewer small businesses. Add to this the indignation the financially struggling and inexperienced small businessperson suffers due to overbearing regulation and authoritarian demands, which corporations and franchises have the money and power to avoid.

No one is bold enough to step outright on the Lanham Act and to stop the use of registered trademarks. Some cities flirt with it, but are only successful in manipulating the copy on the independent or small merchant's sign. Regardless of rules against content-neutrality, the planners know they can get away with this bullying tactic on small businesspeople because of their inexperience and lack of capital. *The Legislative Guidebook* encourages this kind of behavior, and what is worse is that it encourages this behavior from individuals who have no training to understand the risks and difficulties they are introducing for the small business community, or the negative impacts that will result for cities that implement these and other policies promoted in *The Legislative Guidebook*.

Let me give you just one example of the kind of trouble cities will face. It is a fact that many of the older buildings small businesses lease or buy are built right up to the property line, directly against the public right of way. When a sign projects even one or two inches from the face of the building, let alone the 20 to 30 inches necessary to be readable through the windshield of a passing automobile, it is projecting over public space. *The Legislative Guidebook* suggests that these situ-

ations require additional regulatory oversight, which increases lending risk. However, municipalities that apply this kind of additional risk to marginal buildings will find the regulations will drive small businesses away from existing buildings and into new buildings, and it will give a tremendous advantage to the corporate and franchise operations. Thus, the regulations will work against their goals of urban renewal, deceleration of urban sprawl, and prevention of urban deterioration.

Furthermore, "pedestrian-oriented" business signs, as apparently advocated by Guidebook (2–101(2), are not functional for automobile-dependent communities. Potential consumers do not stroll around 12th & Teutonia in Milwaukee; 92nd and Central in Los Angeles; Fenkel & Livernois in Detroit; 79th & Halsted in Chicago, etc. The view is from a moving vehicle and the shopping mission is very direct and focused. One must not consider these neighborhoods synonymous with the mega malls of suburbia.

In the late 1920's, the Supreme Court ruled that an exception or variance process must be a part of land use regulation. It is a fact, however, that such a process favors the well-financed, well-educated, and well-connected. Exception or variance processes are pervasive throughout *The Legislative Guidebook*. If a first-time entrepreneur has the six to twelve months to wait, and the necessary revenue, knowledge, and/or political connections, he or she might be able to obtain a variance and overcome many of these obstacles. But this is far from the norm for the small business community, and especially for the African-American small business community. The exception or variance process subjects important factors like the functionality of a district, motorists' visual acuity, the speed of traffic, and the need for increased visibility in certain areas (such as areas focused on impulse or a heavy volume of retailing, or where people are unfamiliar with the area), to the lofty goal of promoting "aesthetics", and creates even more uncertainty for the small business community.

It is truly a sad commentary that the American Planning Association, a trade organization working to enhance the job security of its members, can do so, by using millions of dollars of federal funding, on the back of the small business community, by creating a regulatory scheme which its members will enforce, and which will have the practical effect of institutionalizing racism by closing the door of opportunity for the typical African-American who simply dreams of owning his or her own business.

Regardless of how good it is for the 30,000 APA members who will have guaranteed employment and totalitarian authority over a major portion of the economy, and regardless of how good it is for the few consulting firms that will take a healthy share of the $400 million booty, the regulations put forward in this "Legislative Guidebook" are not good for the small business community. They will introduce risk, uncertainty and exception procedures that will shrink and eliminate important financing opportunities.

It is good for another group—that is, the large corporations. Do not expect members of that group to come forward in large numbers and fight this. It rests to representatives of small business, such as the National Black Chamber of Commerce, to accomplish that. Again, thank you for this great opportunity to speak before you.

Mr. CHABOT. Thank you very much.

Mr. Claus?

STATEMENT OF R. JAMES CLAUS, PH.D., PRINCIPAL, CLAUS CONSULTING

Mr. CLAUS. Thank you, Chairman, for holding these meetings.

Very simply, this is not about land use planning. And anyone who thinks it is has to read the document and they will be quickly dissuaded. It's about how you're going to do land use planning. There will be winners and there will be losers here, and there will be substantial losers.

The simple fact of the matter is, in writing any form of land use planning document, because it is a police power, the wider the net, the more severe the sanctions, the more you should concentrate on adequate public hearing, research that is balanced and fair, and you should be extremely cautious in recommending sanctions, particularly anything as silly as a private attorney general provision, so you can set neighbor on neighbor.

The fact of the matter is, this guidebook, I believe, was done jointly between the American Planning Association and set governmental activists. We will supply materials we believe will help corroborate those statements.

But if you take a look at the guidebook, it fails in every way. It wasn't reviewed by people who will lose substantial civil and property rights. It criminalizes an activity to a degree that it should terrorize anyone looking at it.

More than that, if you look at it, it's basic review of the cases is not fair. It's not reasonable. And I don't believe it's the law. You might consider in your jurisdiction, rather than the cases we presented, the *North Olmsted Chamber of Commerce* v. *North Olmsted*.

Even the union, Local 639, got involved with 175 businesses because of the overreaching of this kind of sanction into normal, everyday activity with criminal sanction for no reason.

There's a second problem; this really needs to be looked at carefully. It is completely out of step with where the Federal Government has gone in a highly enlightened way to make land use planning beneficial and useful. First, it is completely outside Title 11, Financial Institution Economic Recovery and Regulatory Act. Uniform standards of professional practice set down standards for research. This document absolutely ignores that, even though they are absolutely recommending and talking about value on business property and your personal civil rights.

And frankly, there are places it recommends, in my opinion, violation of Federal law. For instance, recently in a personal case in Oregon, we were—tried to be told by the local planners that *Truex Oil* v. *the City of Salem* was the law. And the fact is, *Hansen* v. *ODOT* is the law, and it required compensation. Without that kind of language, you're encouraging people to violate the law.

In our litigation I mentioned in Ohio, that you get short shrift if any mention in this guidebook, the courts have done a very simple thing. The wider your net, the worse your sanctions, and the more intrusive it is into our everyday life, the more of a burden they're putting on the government.

In our case, they have specified time, place, and manner, and content neutrality. There must be a provable, substantial benefit. That is, they have shifted the evidentiary proof, and it must be narrowly crafted. This is being done because documents like the legislative guidebook are phenomenally intrusive and they are not going to be allowed in the end by the courts.

What I am saying is, in addition to the huge—and you will hear something of the cost that this kind of top-down planning inflicts—it is incredibly erosive of your ability even to go the marketplace, because what it introduces is a police power mentality that censors your speech, retroactively takes business and property without compensation, and due process of law is nothing but a charade under this, where you appear in front of a planner and he tells you, "I'm taking your property for the public good."

Anything that is that far out of phase needs to be turned back and turned back radically. This Committee is taking the first step. There are other steps that need to be taken. How something that is so contrary to constitutional principles of free speech, just com-

pensation, and due process of law could have gotten this far out of whack—we need to start looking at the agency that did that, and the in particular individuals.

Further, you need to recommend to your colleagues they begin to look at some of these Web sties. You have hotlinks on EPA and FEMA to their Web site. I would submit it is exactly what we're objecting to. It appears to be endorsed by the Federal Government when it is contrary to rule and regulation and constitutional law.

I would finish by saying that anything you can do to block the intrusion of this land use model that has been proposed by APA, is in their land use standards and in their forums, is beneficial.

Certainly, Senate bill 975, House bill 1433 should be defeated simply because they're a further attack on our rights and privileges.

But I would conclude by saying, please understand there are land use statutes in this country. They have been modernized. They have been changed, as any intelligent person needs. We don't need this now, as long as we have a court system that is as functional and as long as a Congress as creative and concerned about the American citizens as this Congress has continually proven it is. Thank you.

[The prepared statement of Mr. Claus follows:]

PREPARED STATEMENT OF R. JAMES CLAUS

OVERVIEW

The Senate Committee on Environment and Public Works has before it SB 975. The House of Representatives currently has in committee H.R. 1433. While there are slight differences between these two proposed pieces of legislation, essentially they both represent an attempt by the American Planning Association (APA) and government regulators to find a quarter of a billion dollars to distribute and implement their legislative guidebook and the state enabling statutes contained within. This guidebook is part of their "Growing Smart" campaign designed to radically alter land use planning practices on a national scale.

The APA's legislative guidebook is an extensive and intensive effort to strengthen and expand government police powers as related to land use regulations in the United States. The guidebook has been developed entirely by regulators, and, with a few minor exceptions, has been submitted for peer review only to other regulators. While it proposes regulations that would substantially impact the personal and property civil rights of many, separately identifiable groups, almost without exception representatives of these groups have been excluded from participation in the formulation of the legislation that APA is proposing. In the few cases that non-regulators have become aware of the pending legislation or the guidebook behind it, their requests to become involved in the process of review and comment on the proposals advocated by the guidebook have been summarily rejected.

To what types of legislative proposals am I referring that will adversely impact personal and property civil rights? Primarily there are two:

1. A near-complete disregard for the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, with respect to the right of individuals to receive just compensation when their property is taken for a public purpose and to receive due process and equal treatment in regulatory procedures.
2. An onerous "criminalizing" of the land use planning process by authorizing criminal punishment, including both substantial fines and imprisonment for violation of land use zones and regulations.

To which groups of affected individuals am I referring? Primarily, there are two:

1. Owners of real property, particularly commercial property and marginal farmland adjacent to urban areas.
2. The business community, including both large and small business, with particular adverse impact on small entrepreneurial and minority business.

A third group encompasses almost everyone who depends upon a well-maintained effective highway system. In this group, of course, are those who deliver 90% of our goods and products, or who commute (because they prefer living in suburban areas) or choose to arrive at vacation destinations by car. Even more dependent upon this system is the military and emergency response teams. We often forget that the reason behind creation of the federal interstate highway system was to permit the quick and efficient movement of military and emergency vehicles in the event of both local and national disasters. The APA legislative guidelines specifically advocate the diversion of highway construction and maintenance funds to financing urban mass transit and higher urban densities around inner-city transit stops and stations.

I address the Fifth and Fourteenth Amendment concerns first.

FIFTH AMENDMENT

The APA legislative guidebook is a massive tome. In chapter after chapter it sets out in great detail how government agencies—state and local—can restructure urban environments without accountability to voters, or even elected officials. Certainly nowhere does it express any concern whatsoever for the financial impact on property owners or those who would like to become property owners within the subject areas. As attorneys and legal experts, I am sure the members of this Committee are concerned when the just compensation guarantees of the Fifth Amendment are dismissed as not worthy of consideration. Or when great emphasis is placed on state enabling statutes that authorize local governments to regulate for the public health, safety and welfare without an equally great emphasis on the indisputable fact that federal and state courts across the country, led by the U.S. Supreme Court, have placed myriad, constitutionally-based restrictions on the exercise of police powers. These restrictions particularly target subjective declarations that the regulations are "for the people's own good."

As just one example of judicial dismay with regulations designed to impose a subjective point of view or an "appropriate" lifestyle, I refer to *44 Liquormart v. Rhode Island,* 116 S.Ct. 1495 (1996).[1] Although a First Amendment case concerning restriction on commercial speech that advertised retail liquor prices, the Court's admonition ". . . [t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good" is applicable to all regulatory schemes that adversely impact any Constitutional guarantee on nothing but subjective grounds.

The APA's "Growing Smart" legislative initiative is intended to regulate how and where we live because, according to its creators, we are not intelligent enough to make such decisions for ourselves. Therefore, we must be dealt with on a national scale through regulatory agencies and massive planner-oriented bureaucracies that will direct nearly every aspect of growth and development, and the "look, feel and function" of every urban, suburban and rural area in America.

In advocating its policy of state control of local environments, the Legislative Guidebook is remarkable for its consistent failure to caution that land use planning and zoning is subject to constitutional imperatives and judicial scrutiny, particularly when it adversely impacts basic civil and property rights. Nor does it warn those local governments who might adopt its guidelines that they face substantial legal bills if their regulatory scheme is successfully challenged. Instead, the "Growing Smart" initiative advocates intensive manipulation of property and civil rights through total reliance on state enabling statutes. It too often does this without regard for either the Constitution or federal laws that place constraints on the unfettered exercise of sovereign police powers.

Before beginning analysis of the legislative guidebook's attack on the Fifth Amendment and federal law, particularly the 1970 Rehabilitation and Removal Act, I respectfully direct your attention to the APA's policy statement concerning "takings." (Exhibit 1)

In April 1995, the APA Board of Directors ratified a policy guide on "takings" that had been adopted by a chapter delegate assembly convened in Toronto, Canada. After giving validation to the Fifth Amendment's proscription against taking private property for a public purpose without "just compensation," as in eminent domain cases, the APA concluded that the same did not hold true for a regulatory impact that adversely affected either a property right, or the value of property, or both. Allegedly relying on court cases, which are never cited, the APA posits that land use regulation is subject only to "reasonable relationship" judicial inquiry, and just compensation is due only when a landowner has been denied all economically viable use

[1] *44 Liquormar*t, Justice John Paul Stevens; pp 1507–1508.

of the land. The APA then finds, without equivocation or caution, that the courts have upheld the right of local government to intervene in private activity or the use of private property to protect the public health, safety and welfare. It provides extreme examples, essentially grounded in nuisance, to support this proclamation.

The APA policy statement continues with an alarmist treatise concerning the efforts of property owners to protect their rights through legislative relief from some of the effects of intensive land-use regulation. While giving token acknowledgement that *some* legislation has been the result of *some* legitimate concerns, for the most part legislative relief is nothing but "anti-regulation clothed in the fabric of private property rights." We are then again treated to extreme examples of what is apt to happen if landowners are compensated for reduction in economic value resulting from government regulation. Generally, these examples focus on either bankrupting the state or creating significant federal deficits, or upon fostering a massive bureaucracy to develop economic impact statements (interestingly, the APA expresses no similar alarm that its "Growing Smart" legislation will create a massive bureaucracy). The statement continues with an apologia for zoning as a way to protect property values by, using another of its extreme examples, preventing the siting of a grocery store that also sells liquor in a residential district.

The policy statement concludes with the fact that the APA "strongly opposes most of the proposed 'takings' legislation its representatives have seen," finding that "the collective political forces that have joined in support of 'takings' legislation have grossly distorted both the frequency and the intensity of the occurrence of hardship caused by government regulations . . . [p]roperty rights advocates are waging a guerrilla war of sound-bites, misleading 'spin-doctoring' and power politics which have characterized governments at every level as evil empires of bad intent . . . [these advocates] . . . wrap themselves in the flag and the distorted appearance of constitutional rights."

Thus, the APA Board and its supporters contemptuously dismiss the legitimate concerns of many people that the policies advocated by the APA are overreaching, and yes, in many cases, unconstitutional.

The Introduction to the Legislative Guidebook takes great pains to tell us that it is a research product that does not necessarily represent the policy of the APA, unless specifically identified as such in a policy guide or other action by its Board of Directors. The APA's position on "takings" is clearly articulated in its policy guide. We are duly warned, therefore, that behind the research of the Guidebook is at least one APA policy that seeks to neutralize, perhaps even destroy, the Fifth Amendment's "just compensation" application to regulatory actions that take away property value without a provable nexus to legitimate public interests.

The error of the APA's reliance on a defense that a zoning regulation need only be "reasonable" to withstand legal challenge, or that, as a matter of law, land-use decisions are immune from judicial scrutiny under all circumstances, or both, was soundly pointed out to it by the U.S. Supreme Court in *City of Monterey v. Del Monte Dunes at Monterey, Ltd., et al,* 526 U.S. 687 (1999). The Court affirmed that just compensation would be due either if a regulation denied all economically viable use of the subject property *or if a regulatory act failed to substantially advance a legitimate public interest.* In specific response to the APA's *amicus* brief filed on behalf of the City, Justice Kennedy, delivering the opinion of the Court, said:

> "To the extent that the City contends the [lower courts'] judgment was based upon a jury determination of the reasonableness of its general zoning laws or land-use policies, its argument can be squared neither with the jury instructions or the theory on which the case was tried, which was confined to the question of whether, in light of the case's history and context, the city's particular decision . . . *was reasonably related to the city's proffered justifications* . . . [t]o the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles and is rejected.

Having been defeated in *Del Monte Dunes*, and also *Dolan v. City of Tigard*, 512 U.S. 374—a case in which the Court concluded there must be at least a *rough proportionality* between the regulatory act and the state's asserted interest—the APA has increasingly touted "amortization" as a method to avoid compensating property owners adversely impacted by the land-use regulations it advocates.

Briefly, amortization in the land-use regulatory sense, is used to achieve the demise of a property use or improvement that was legal and conforming before the enactment of new rules or regulations. The APA theorizes that by granting a "grace period" during which the newly offending use or property may continue is more than sufficient payment for its eventual removal. The grace or amortization period is arbitrarily based on the "life" of the asset as calculated under depreciation schedules

used for tax accounting purposes. No cash compensation for the loss of use property will be paid because, the APA reasons, the property owner or user has recovered costs, and that is all he or she is entitled to. The APA does not care that the interest or asset has economic value to its owner or user far in excess of its original costs. All the APA cares about is that it is eventually gone—and the sooner the better (most amortization periods are only 3–5 years).

Amortization in the world of planners is simply a compensation-avoidance scheme, and nothing less. It is also a scheme that has been rejected by the U.S. Congress, as evident in the 1970 Rehabilitation and Removal Act.

Although primarily directed to correcting the inequities of amortization when the Highway Beautification Act is invoked to remove outdoor advertising structures, the 1970 Act, in essence, requires cash compensation based on true economic value when removal of any property pursuant to a regulatory "takings" if federal funds are involved in the project. This fact is not only ignored by the APA in the hundreds of thousands of words contained in its Guidebook and in its unrelenting attack on outdoor advertising structures, the APA proselytizes endlessly on ways to overcome the Act and federal compensation schedules, which among other compensatory remedies permit compensation based on income generated by the subject structure. The only time the cost of a structure enters the equation is when the subject structure can actually be relocated in a similarly effective location in terms of visibility to roadway traffic—a circumstance that almost never presents itself.

By way of example, I respectfully refer the Members to the APA's "Policy Guide on Billboard Controls," ratified by the APA Board of Directors in April 1997. (Exhibit 2)

. . . [M]any communities find it impossible to enforce their billboard ordinances along highly-visible transportation routes because of *special-interest provisions* in the Intermodal Surface Transportation Efficiency Act, successor to the Federal Highway Beautification Act . . . *[u]nfortunately*, in 1978 Congress adopted an amendment to the Highway Beautification Act . . . [b]efore the amendment . . . local governments in many states could require the removal of nonconforming billboards along Federal highways, offering compensation through amortization . . . [t]he Act now requires local governments to pay billboard owners before a nonconforming billboard can be removed. . . . Although in many cases [local governments] can and do require the removal of *other signs* without cash compensation, they can require removal of signs along heavily-traveled federal-aid highways only if they pay compensation. . . . In short, federal intervention intended to make highway corridors more beautiful has been *manipulated by special interests* to make it more difficult for local governments to use their own tools to accomplish the original purposes of the Highway Beautification Act.

The "policy guide" continues: The APA promotes federal legislation that restores to local governments the authority to require the removal of billboards *and other signs* through amortization, and promotes the adoption where necessary of state legislation that expressly authorizes local governments to offer amortization as compensation for a requirement to remove nonconforming billboards *and other signs* within the jurisdiction of the local government.

I emphasize the words "other signs" to emphasize the fact that on-premise business signs, which are unprotected under the federal Acts, are considered fair game for burdensome treatment and retroactive regulatory "takings" without just compensation precisely because the APA refuses to acknowledge their extreme value to the businesses they identify and advertise, or the adverse impact on business revenues that occurs when signs are downsized to the point where they are, for all intents and purposes, invisible. Especially hard-hit by restrictive sign codes that limit signage height, size, placement or illumination are small businesses that in most instances rely entirely on optimally visible and readable on-premise signage to signal their presence to those passing by.

The distain for property owners, and the 1978 Congress which attempted to protect at least some of them, is patent in these policy statements. The distain continues in the APA's Legislative Guidebook. In fact, what is occurring in this partnership between HUD, an agency of the executive branch, and the APA is an effort to end run the federal checks and balances system by intentionally failing to point out that, indeed, federal law and court cases have in the past, and will in the future, "check and balance" the actions of the executive branch, particularly when the intent of the action is to *unilaterally* impact the lives and property of the general public.

Additionally, the APA-HUD program envisions $250,000,000 in federal funds to support implementation of its Guidebook, when the Guidebook specifically authorizes amortization of non-conforming uses. Amortization is specifically disallowed in

regulatory undertakings that are in any way tied to federal funding. Therefore, I posit, the HUD-APA project directly advocates violation of federal law.

Fourteenth Amendment

The Fourteenth Amendment comes into play as we try to deal with the regulatory plans set out in the Guidebook. Minimally, to pass Fourteenth Amendment "due process and equal treatment" tests, a regulation or regulatory scheme must be sufficiently clear to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited; otherwise, individuals might be punished for conduct they could not have known was illegal, or enforcement might be subjective, arbitrary or discriminatory. The need for clarity of language and objectivity in enforcement is especially important when violation may be punished as a criminal offense, subject to both fine and imprisonment.

Chapter 9 of the Guidebook ("Special and Environmental Land Development Regulation and Land-Use Incentives") is particularly troubling because it raises the possibility of criminal conduct for engaging in the customary use and enjoyment of one's property, particularly agricultural properties. While purporting to be concerned with balancing the need to protect the public and environment with the rights of property owners, the thrust of the chapter focuses on ways to tip the balance in favor of the environment at the expense of property owners.

For example, in agricultural areas it is often the case that farmers may "alter land form" or, as the Guidebook puts it, by human act "change the existing topography of the land" in the ordinary course of their agricultural operation, and may do this without intention to disrupt something the planning authorities have called a "critical and sensitive area." Perhaps it is a generational farm with a "wet spot" that has been plowed for decades; perhaps the farmer has a general idea that "wetlands" are protected but doesn't think of his wet spot as falling into that category.

When the environmental or planning authorities come to investigate, does the farmer's "no trespassing sign" apply to them? No. Because his land is in plain view, the thinking espoused by the APA is that investigators can enter at will because no right of privacy attaches to open areas. Will the farmer's obviously intentional act of plowing and his general knowledge that wetlands are protected satisfy the APA's criteria of "intentional and knowing" violation that leads to criminal charges? Under the Guidebook's proposals, the likely answer to this question is "yes."

Please do not think that I exaggerate in this example. The scenario, or something very similar, will occur. As a result, farmers and ranchers across the country are in serious jeopardy under the APA Guidebook.

Chapter 9 also deals extensively with historic districts and landmarks, subjecting buildings that may fall into the designations to extensive, and very subjective, controls that may extend beyond the exterior to the interior. Additionally, where an individual property may have historic preservation potential, the regulatory format suggested by the Guidebook specifically authorizes a construction or development moratoria of up to 180 days to permit a local government to complete a designation process that will include the subject property. The only recourse from the moratoria by the affected landowner is mediation≤a time consuming process that will almost certainly extend beyond the 180-day period, thereby negating its usefulness in providing an avenue of relief. Finally, the Guidebook authorizes a code enforcement agency to order an owner to correct perceived defects in the owner's compliance with the required "look" of his or her building, either its exterior or interior. If the owner fails to maintain the property as required by the regulation, as a "generally-available remedy" in the model code, the code enforcement agency may enter the premises to repair the "defect" and impose a lien against the property for expenses incurred. The reason for a failure to maintain, such as an economic downturn that has reduced funds available for maintenance, is apparently irrelevant—the property can be entered, repaired or "fixed up," and liened, with no limit on costs.

Another troubling aspect is the Guidebook's "due process" models—both substantive and procedural. In almost every instance, they are overly cumbersome and extremely time-consuming, necessarily imposing delays that will increase development costs, and possibly adversely affect the development's market value before construction is finally complete. Further, the Guidebook adds several levels of appeals of a denial of an application before administrative proceedings are sufficiently "exhausted" at the local level to permit removal to the state court system.

The Guidebook also suggests that one "remedy" for denial is a requirement that the applicant resubmit the application under another theory, such as variance or conditional use. In this scenario, the applicant is not considered to have exhausted local remedies until he has submitted at least one other application that either meets the conditions enjoining approval of the first application or comes before the permitting authority with a request for exemption from the regulation. Since the

Guidebook also discourages variances and conditional uses, it is very unlikely that an applicant will gain approval of such requests. The result of this "two or more" applications procedure unfairly entangles the applicant in local land-use procedures (in direct contravention of *Monterey v. Del Monte Dunes (supra)*, and such a requirement was rejected by the U.S. Supreme Court in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001). In this case, the Court said that it was not necessary for an applicant to submit more than one completed application for a case to "ripen" for adjudication.

The lack of certainty in the highly subjective and time consuming regulatory process advocated throughout the Guidebook will ultimately have a very chilling effect on investor or bank willingness to commit development or redevelopment funds. A lack of funds ultimately will also have a chilling effect on the "growing smart" programs—an effect, I believe, the Guidebook authors and supporters have overlooked.

Exhibit 3, a letter to the APA hierarchy from the National Association of Industrial and Office Properties, National Multi-Housing Council, Self Storage Association, and American Road & Transportation Builders Association, addresses many of the concerns I have expressed. Exhibit 4, a letter to the mayor of Las Vegas from John E. Scott, SBA District Director for Nevada, describes SBA apprehensions regarding regulations that may dry up commercial lending support because of increased risks to businesses. Mr. Scott's letter was prompted by the city's efforts to enact an APA-model sign code that placed severe restrictions on sign size, height, illumination and placement and favored non-compensatory regulatory "takings" under an amortization clause. He is particularly concerned that the on-premise business sign regulations consistently proposed by planning consultants with close APA ties essentially render business signage invisible, thereby severely compromising the ability of businesses, small businesses in particular, to effectively communicate with potential customers.

Simply, the due process models advocated in the Guidebook are incapable of satisfying the Fourteenth Amendment requirements that regulations be clear, concise, capable of objective enforcement, and provide for timely appeal. Further, and in spite of U.S. Supreme Court decision after decision, and the decisions of many lower federal courts, the Guidebook insists that local governments can regulate or adversely impact a basic civil right, such as the right to display commercial speech via signage, for "aesthetic or appearance" purposes without any qualifying language whatsoever that such regulation is impermissible in the absence of proof, by the government, that (1) there is a *substantial* government interest which justifies the regulation, (2) the regulation *directly advances* that interest, and (3) the regulation is *narrowly tailored* and *no more extensive than necessary* to achieve that interest. In the case of commercial speech, as protected by the First Amendment, an additional requirement the government must prove is that the regulation *leaves open ample alternative avenues of communication*. And, if the commercial speech regulation is based on either the content of the message or the identity of the messenger, the government must prove that the interest served by the regulation is *compelling*.

Under either the Fourteenth Amendment or the First Amendment, in the context of land use regulatory schemes, regulations based on unfettered subjective or discretionary determinations by the governing or permitting authority of what is beautiful and or "appropriate" are immediately suspect as unconstitutional and subject to intensified judicial scrutiny. Certainly, more than a "rational relationship" between the government act and its effect on a basic civil right is required when a fundamental interest is at stake.

Foreclosure from the Debate by Those Most Affected

The Legislative Guidebook offers "model statutes" that are driven by executive orders or institutional authorities. The Guidebook is written without concern for voter opinion or preferences or the legal and economic consequences of its scheme. Further, it was written without opportunity for those most affected to participate in its formulation. The Guidebook authors themselves, in recognition that opposition to their agenda may be encountered, urge those who support the APA program to consider that "[p]rivate coalition building or consensus building is appropriate when there is little support among legislators or governors for planning law reform or when reform has not been perceived as a statewide issue."

The exclusion practiced by the APA in its formulation of a legislative initiative replete with incalculable risks and hardships for many citizens should it be enacted and funded, is not only unconscionable, it undermines the fundamental democratic principles upon which our nation is founded.

In a self-serving policy "guideline," designed to assuage the very real concerns of many that the Guidebook is intended to impose land-use regulations without citizen accountability, the Guidebook asserts that one ingredient of a successful reform ef-

fort is to "hold public hearings and invite widespread participation" (Ch. 1–7). Another important ingredient is to make sure "a study commission is comprised of individuals, elected or not, with varying perspectives" (Ch. 1–10). Obviously, these ingredients are nothing but window dressing, as evidenced by the APA's failure to invite either widespread participation or varying perspectives during its development of the Guidebook. In fact, it summarily refused entrance to its "reform" efforts to not only the individuals who are meeting with the members today, but to many others, as evidenced by the documents you have been given.

We do know who did participate, however, in page after page of "acknowledgements." A review of these acknowledgements reveals planners, land use planning professors, attorneys who have only litigated on behalf of government, and national associations of governors, towns, cities, counties and regions. A further review reveals no representatives from real property broker associations, property appraiser associations, chambers of commerce, commercial developers, agricultural or farm groups, or trade associations, with two exceptions: the Home Builders Association—a group that simply passes its added costs on to the beleaguered home buyer, and the Self Storage Association. This latter association, however, has withdrawn its support for the Guidebook. One reason for this withdrawal is that the Directorate in charge of the project reopened discussions for input by several "environmental" groups, who changed much of the original product. (I respectfully refer you again to Exhibit 3, which clearly, competently and concisely articulates the problems with the Guidebook and its development.) The Committee members will note there are self-proclaimed defenders of wildlife actively participating, but no defenders of property rights, who have been labeled by the APA as "special interest groups," in seeming unawareness that wildlife defenders are very much representative of special interest groups. And while personnel from such agencies as the EPA and FTA are very much in evidence as "participants," representatives from the Small Business Administration are nowhere to be found.

There is even a special acknowledgement reserved for HUD personnel. I quote from the final draft (please note that much of this text was removed in the published version to hide the Federal government's involvement):

> *"We especially thank current HUD Secretary Mel Martinez for his support in seeing the project through to its completion; former HUD Secretary Henry G. Cisneros for his backing when the project was launched in 1994; former HUD Secretary Andrew Cuomo, for his staff's support during the project's interim period; current HUD General Assistant Deputy Assistant Secretary Lawrence Thompson; former HUD Assistant Secretary for Policy Development Michael A. Stegman, AICP; HUD Deputy Assistant Secretary for Research Evaluation and Monitoring Xavier de Sousa Briggs; and former Deputy Assistant Secretary for Research, Evaluation, and Monitoring Margery Austin Turner for their continuing support and their vision of the potential of statutory reform.*
>
> *"James E. Hoben, AICP, supervising community planner in HUD's Office of Policy Development and Research (PDR), was the initial project officer for Growing Smart and provided APA with challenging, insightful, enthusiastic, and stimulating reviews of all work products and, as a consequence, greatly influenced the course of the project. . . .*
>
> *"HUD was particularly helpful in bringing together other federal agency staff in Washington, D.C. who lent their expertise to the preparation of the model statutes and commentary . . ."*

Clearly, HUD staff directly participated in this project. The acknowledgements imply that HUD staff edited it. In spite of the disclaimer that HUD does not endorse the Legislative Guidebook, it is impossible to think otherwise.

DISCUSSION

The purpose of the Guidebook is to set forth a legislative "blueprint" for zoning and land use planning. With federal funding as an incentive, states are to adopt this blueprint that will mandate "an integrated state-regional-local planning system that is both vertically and horizontally consistent" (p. 2–27). Regional and local plans are to be vertically consistent with state plans and vice versa. The plans of local communities are to be horizontally consistent with each other. This inevitably creates a system steeped in bureaucracy with rigid control over local issues. Moreover, the constitutional notion of local "laboratories of experimentation" is destroyed.

The scope of the Guidebook moves far beyond the regulation of land use planning and mandates a broader reach of governmental planning that expressly deals with a wide range of social and economic issues (p. xvii). Model statutes create ancillary departments and programs only tangentially related to land regulation (such as

traffic reduction—9–201). The social and economic policies that are mandated reflect the APA's narrow view of how all communities should look and function. For example, suggested model zoning ordinances require development of "traditional neighborhoods" (8–201(5)). No alternative views of community development are represented.

Simply, the Guidebook strongly evidences an effort to ignore 75 years of federal judicial and congressional restraints, policies and procedures implemented to protect the rights of the American people while creating the most diverse and prosperous society in the history of the world. This federal system has successfully integrated market based activities, consumer preferences and interests, and citizens' civil and property rights, while building a livable and sustainable modern society. But the APA and its supporters at the federal level (HUD, FTA, FEMA, EPA) are attempting to turn back the clock to the 1930s—a time before the federal courts and Congress began to correct land-use planning abuses and to assure a regulatory framework that stays within the general bounds of common law and U.S. Constitutional constraints.

The Guidebook consistently underrates, and in some cases completely ignores, the constraints the federal judiciary has put on the use of police powers to enforce the regulation of normal civil behavior or employ criminal procedure and punishment to civil violations (in fact, the Legislative Guidebook introduces extreme sanctions that I doubt any federal court would find constitutional). Instead, the APA and its partners at HUD have presented land use planning as if it is a process that is constitutional *per se*, rather than portraying how the process of land use planning decision-making by all state and local governments has been limited or modified by the federal court cases. Additionally, the Legislative Guidebook offers no suggestion of how these court decisions have shifted the evidentiary burden of proof to the government as well as increased the level of judicial scrutiny in certain land use planning cases. In other words, the document fails to explain that in some cases, if the government is going to intervene in the lives of Americans, it must be able to prove more than a rational relationship between the act and the effect, and that its intrusion will achieve a substantial benefit without going any further than necessary to obtain that benefit.

In one example, the Legislative Guidebook's presentation of *Dolan v. City of Tigard* [512 U.S. 374 (1994)], an Oregon case, is a complete misrepresentation of the significance of the case, and possibly of the law that has flowed from it. Prior to 1994, Oregon municipalities had been successfully avoiding compensation for taking tracts of land for ill-defined "public purposes" by tying approval of development applications to dedications of property to the city. These dedications were demanded even if the public was neither harmed by the proposed development nor particularly benefited by the "public purpose" the dedication was supposed to serve.

In *Dolan*, the plaintiff's project would have had no adverse impact whatsoever on the public, and the public benefit of the "dedication" was essentially nonexistent. In spite of the Supreme Court's ruling that a dedication must be "related both in nature and extent to the impact of the proposed development" (*Dolan, supra*, p. 391), the implication in the Guidebook is that Dolan is an aberration, not once "revisited" by the Supreme Court. Therefore, according to the Guidebook, it is still acceptable for a local government to demand dedications or fee exactions on little more than a "reasonable relationship" to the proposed development. In fact, and contrary to the Guidebook's implication, the rule of proportionality was invoked by the Supreme Court in *Ehrlich v. Culver City*, 512 U.S. 1231 (1994). In this case, the Court vacated a California Supreme Court ruling upholding an impact fee, and remanded "for further consideration in light of *Dolan*." On remand, the California Supreme Court held that *Dolan* is applicable to fees attached as conditions to a project [911 P.2d 429 (Cal. 1996)]. Neither the *Ehrlich* case, nor any other of the numerous lower state and federal court cases upholding the "essential nexus and rough proportionality" tests of *Dolan*, are cited in the Guidebook.

To compound its lack of candor regarding the legal constraints applied by the courts to over-zealous land use planning, the APA's public relations programs include a statement on its website that gives a resounding endorsement of its "Amicus Curiae Committee" and the briefs filed by said committee "in cases of importance to the planning profession and the public interest." Apparently of especial pride is the fact that four of these briefs were filed in the U.S. Supreme Court. Several cases are listed. I am familiar with three of them—*Lorillard Tobacco Co., et al v. Reilly*, 121 S.Ct. 2404 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); and *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001). (Please see Exhibit 5.)

Palazzolo and *Monterey* have already been touched on briefly. In *Monterey v. Del Monte*, the Supreme Court rejected the APA's position that prior cases decided by

the Court did not require that a regulation substantially advance legitimate public interests. Specifically, the Court said, "Given the posture of the case before us, we decline the suggestions of *amici* to revisit these precedents" (referring to, *inter alia, Dolan, Lucas v. South Caroline Coastal Council, Yee v. Escondido, Agins v. City of Tiburon*). After the city imposed more rigorous demands each of the five times it rejected applications (over a five year period) to develop a parcel of land, the land owner, Del Monte Dunes, successfully brought the case under 42 U.S.C., section 1983, alleging that the city effected a regulatory taking or otherwise injured the property by unlawful acts, without paying compensation or providing an adequate post-deprivation remedy for the loss. In finding for plaintiff on this issue, the jury in the lower court awarded the plaintiff $1.45 million in damages, even though the plaintiff had realized some economic benefit from the property by selling it, during the course of litigation, to the State of California for approximately $800,000. The Supreme Court let the award stand, thereby defeating another favorite APA legal position that compensation is due only when a plaintiff has been denied all economically viable use of the property.

In *Palazzolo* the Supreme Court rejected the APA's argument, in keeping with an earlier case in which the APA's "amicus" team also intervened—*Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997)—holding that there is never a requirement that more than one application be submitted and denied for a case to ripen, unless the applicant makes an "exceedingly grandiose" proposal, which the Court found not to be the case in *Palazzolo*. It is interesting to note that the APA in its *Palazzolo* amicus brief disavowed its amicus brief in *Suitum*—a brief relied on by the National Association of Home Builders in its amicus brief filed on behalf of the plaintiff. In repudiating its former brief, the APA stated that the *Suitum* brief did not accurately represent its views, whereas the instant brief did. In the end it did not matter, because the Supreme Court found the APA's position unpersuasive in either case, finding in *Palazzolo* that a compensatory regulatory takings had occurred, and remanding the case to determine the award (or damages) amount.

Lorillard Tobacco was a First Amendment case. Here, the Court struck down a Massachusetts law that imposed severe location restrictions on signs advertising tobacco products. The state, and the APA, argued that such restrictions were necessary to discourage tobacco use by minors. Although the Court acknowledged that the state had a substantial, possibly even compelling interest in preventing children from using tobacco, because the regulation impacted speech, based on the content of the speech, the regulation failed constitutional requirements that it be narrowly tailored and no more extensive than necessary to advance the interest. The Court further found that the state's effort to discourage underage tobacco use unduly impinged on advertisers' "ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." (@ 2427.) Additionally, the Court noted that "in some geographical areas, these regulations would constitute nearly a total ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers. (@ 2425.)

The clear implication of the APA "amicus curiae" press release is that the APA's briefs resulted in government wins in all the cases listed, when such implication is, in fact, untrue. Further, I believe it can be reasonably argued that the APA's incredible expansion of moratorium powers as a tool to delay, even ban development while a local government figures out how to stop or severely restrict development under a new "growing smart" statute is a deliberate effort to sidestep the ruling in *Monterey v. Del Monte Dunes* (Chapter 8, Model Statute 8–604). Monterey got into trouble because it had to continuously invent reasons not present in the code to stop development it didn't want. The Guidebook's moratorium statute now legitimizes delay while reasons for denial are worked out.

As for *Lorillard*, throughout its whole discussion of signage regulation (either on-premise or off-premise), the Guidebook does not once mention that the First Amendment protects the display of commercial speech on signs, nor does it caution local governments that great care must be taken when regulating such speech, particularly since violation of First Amendment rights may subject the local government to extensive monetary damages under 42 U.S.C., section 1983.

Thus, while the Legislative Guidebook patently recommends government censorship, noncompensatory takings, and exactions, dedications, and moratoriums almost at will, and a type of criminalized process for civil infractions or violations, it is at the same time inexcusably silent regarding the series of landmark federal cases that have made it clear that the U.S. Constitution—and thus, federal law, oversight and sometimes preemption—applies to and places constraints on local land use planning. For me, this is the most serious of all the Guidebook's errors and omissions. From *Gitlow v. New York* [268 U.S. 652 (1925)], to *Monterey v. Del Monte Dunes (supra)*, *Palazzolo (supra)*, and *Lorillard (supra)*, American courts have crafted a complex set

of judicial precedents that expand and protect civil rights, and thereby ensure the health, safety and welfare of our society as a whole. However, it is apparently the intent of APA to ignore the past 75 years of case law in one swift stroke.

The High Cost of Legislative Guidebook Policies and Principles on our Consumer Based Economy

The Legislative Guidebook simplistically asserts that integrating planning through a true master plan and putting A.P.A. members in charge will result in a host of wonderful benefits. However, at no point in this document are the costs presented, even though a cost as well as a benefit analysis is always necessary when proposing regulations that will profoundly affect the ordinary course of human events.

Land use patterns are a reflection of our culture. Individuals and institutions interact with an intricate cultural mix constantly controlled by legal mandates. Hence, land use planning in the United States is, or should be, responsive to our pluralistic, consumer-oriented and mobile society, which is the most productive society in the world. This elaborate interactive model of decision making is the only reliable method for modifying our society's land use guidelines. Responsible land use planning is a complex process that has, over the years and in concert with other responsible social and economic programs, fostered development of a live-together/work-together society that cannot be rivaled. Part of this achievement is reflected in the fact that we have the most sustainable and livable retail and housing environment in the world. No other country has it.

The Legislative Guidebook seems intent upon wiping away the incredible changes in lifestyle that have occurred over the last century. One such change is the decline of the traditional stand alone, central business district department store in terms of retail dollars generated. Consumers have increasingly turned away from these forms of retailing as inconvenient and time consuming. Malls, on the other hand, have advanced by bringing many different shops together for a one-stop shopping trip, combined with entertainment and a stimulating visual experience. Is our society saving or losing money with today's shopping patterns? The APA discounts the cost of delays or loss of convenient retailing that takes advantage of economies of scale. But the inefficiencies that APA seeks to build into the system exact a considerable cost. In Europe and Japan those inefficiencies manifest themselves in a 15% to 50% higher retail cost. In the United States, retail efficiencies have dramatically increased the standard of living across the board.

In addition to certain economic impacts, there may be an enormous cost involved in building the infrastructure needed to support the dense development called for in the document. We have experienced this problem in Oregon, where whole neighborhoods have rebelled over zoning density increases in areas where streets were too narrow, sidewalks and water management systems nonexistent, and sewer capacity, public safety, parks and schools inadequate to handle the increased population. In Portland, the "Smart Growth" philosophy, which ignores consumer preferences entirely, has resulted in misallocation of public resources on a grand scale. For example, as much as 70% of transportation dollars available in the city have been spent on a public transit system that serves 3% of the population, while congested city streets remain in disrepair.

This sort of outcome means that the benefit cost analysis, particularly where certain codes are concerned, will not be able to stand up in court. Because the Legislative Guidebook ignores Congress and the federal courts on land use planning, encourages violation of federal law, ignores federal regulations that demand compensation for takings, and introduces extremely serious questions about the 14th Amendment guarantees of due process and equal treatment, municipalities that implement its suggestions will face very high legal costs when challenged in court for violating people's civil rights. All this adds an additional cost—litigation expenses municipalities will be forced to pay when their codes get turned over. And as Americans become more and more fed up with people interfering with their civil rights, you can anticipate more lawsuits. Clearly, American lawyers have demonstrated a willingness to go that direction, and if punitives are added to cases brought and won under Title 42, USC section 1983, I think the ensuing litigation may rival that of the asbestos trials—the only difference being that the defendants will be local governments and not large corporations.

For an example close to home, after Tigard was forced to pay the Dolans $1.5 million for a bike path the City could have purchased initially for $14,000, but tried to "take" instead, shortly thereafter the City of Eugene, Oregon was forced to pay a settlement to Plaintiff Michael Kelley in the approximate amount of $4 million for a similar uncompensated regulatory "takings" in violation of the Constitution. Following the Kelley case, Plaintiff Joe Willis filed a class action suit against the

City of Eugene on behalf of the many other people who suffered from similar "takings;" and the City of Tigard is facing a new challenge, *Rogers Machinery v. City of Tigard*.

The A.P.A. Agenda: Control of Growth to Achieve No Growth

The APA, like all trade associations, has as its purpose to advance the interests of its members: in other words, where you sit is where you stand. You will hear much argument that this document represents good land use planning. But the Guidebook has very little to do with land use planning, and a great deal to do with employing and empowering planners.

If the codes proposed in this document are implemented, the result will be a seizure of American real estate assets, if you will, putting them into the hands of an elite bureaucracy. This bureaucracy will have private attorney general rights, and in the extreme case be able to prosecute you and send you to jail for violating a zoning ordinance.

Land use planning in Oregon is extolled in various places in the Legislative Guidebook, but the actual story of Oregon is not told there. Let me tell you about the response of Oregonians to Smart Growth.

- When the City of Milwaukie decided to follow Smart Growth, the entire City Council was recalled. The citizens simply rejected it.
- As Portland has attempted to implement Smart Growth one area at a time, sector after sector of the city has rebelled and in some cases forced a complete overhaul of the City's plans in struggles that have lasted for years and cost the City millions of dollars.
- In Beaverton, a mixed use transit-oriented development called "The Round" has sat unfinished—a huge, empty metal skeleton—for two years because no financing can be found to complete the project, despite large taxpayer investments in it.
- Small towns on the outskirts of the Portland metropolitan area have exploded in size because families can no longer afford the high housing costs inside the city's tightly restricted urban growth boundary and are fleeing to the suburbs. Nearby Sherwood has seen a fivefold increase in population in a handful of years, and in February actually put its foot down on any more growth until it can figure out how to provide infrastructure for all the new people.
- The Portland Public School District, which is funded on a per-student basis, is seeing decreasing enrollment as families move to the suburbs, leaving the district in serious financial trouble.
- In December 2001, the Oregon Supreme Court concluded that property taxes in Portland diverted from other government uses and dedicated to urban renewal projects were collected in violation of Oregon's tax limitation law. Failing a reversal, pursuant to a request for reconsideration by Portland, its county (Multnomah) and the Oregon Department of Revenue, the potential refund to property owners may be as high as $30 million. The urban renewal projects that were funded by these tax diversions were for the most part "Smart Growth" programs, including plans to construct an interstate light-rail line (connecting Vancouver WA with downtown Portland) at a cost of $35 million, although public support for such construction was tepid at best.
- After the Portland Development Commission and the Association for Portland Progress launched a study in December 2001 to come up with ways to strengthen and attract retail businesses in the city's downtown Transit Mall, consultants have just recommended reconstruction of the Mall to reinstate curbside parking. This would involve narrowing sidewalks from 30 feet to less than 12 feet in order to revive stagnant and in some cases failing businesses within the Mall proper. Portland architect George Crandall, who presented the proposal said, "It's very difficult for businesses to be healthy, if there isn't some opportunity for parking on the streets they face." The Transit Mall, constructed in 1978, reflects "Smart Growth" policies that encourage public transportation and expansive pedestrian sidewalks at the expense of automobile traffic. Today, even the city realizes that something must be done to shore up the downtown retail climate, and the proposal is now headed for full public airing. (See Exhibit 7-article in the 02/28/02 issue of *The Oregonian*. Also referenced in the article is the rejection by voters of an extension of light-rail in the Mall area.)

The infringement on Oregonians' constitutional rights under Smart Growth has become so common, that in 2000, Oregonians passed Ballot Measure 7, requiring all state and local governments to pay just compensation when government actions re-

duced the value of private property. Currently the measure is under review by the state Supreme Court on technical grounds. Given the activist history of the Court, it will undoubtedly find some reason why the measure violates the law. Metro, Portland's regional planning agency, also finds Measure 7 unpalatable. Soon after its enactment, Metro director, Mike Burton, urged in a speech to the Portland City Club (2/16/2001) that an amendment to the Oregon Constitution was necessary to assure that land-use planners could regulate all land uses without fear that those begin regulated could demand compensation. Planning should be a constitutional right, says Burton, because "uncoordinated land use threatens orderly development, the environment and the welfare of the people."

Despite the discomfiture of Oregon's planning community with Measure 7, lawmakers have been working on enactment of revised versions of the measure. It is my belief that, sooner or later, the state and its local governments may well find themselves in the position of having to pay just compensation for the diminution in land values created by Smart Growth legislation.

In Exhibit 6, the unfortunate impacts of "Growing Smart" programs in Oregon are further outlined in a letter from the counsel for the Associated Equipment Distributors trade organization.

The failure of Smart Growth in Oregon does not stop at the artificial urban growth boundary encapsulating Portland's metropolitan area. In the years since Governor Tom McCall implemented statewide planning, dramatically limiting private property rights in order to preserve farm and forest land, productive farm land has actually decreased, both in terms of significance and actual size. Under Smart Grown policies, farmers have not been able to change their practices and crops to take advantage of world markets and changing consumer tastes, and many have lost the ability to use their land altogether. Forest industries have been hit extremely hard, and reductions in logging have decimated the economies of entire towns. The state tax and land use policies have kept industries out of Oregon to the point where Oregon is suffering from an 8% unemployment rate at a time when the rest of the nation is panicked over an unemployment rate of 4–5%.

Given the obvious adverse impact of Smart Growth programs and policies, one has to wonder why Smart Growth proponents push onward. To understand this, one must analyze their underlying motives. This is not too difficult if you are an Oregonian. The motives, in Oregon, are grounded not in smart growth, but in no growth. This mindset traces its roots to Oregon Governor Tom McCall. Governor McCall made national headlines in 1971 after telling a CBS News interviewer what later became the unofficial state motto: "Come and visit us again and again. This is a state of excitement. But, for heaven's sake, don't come here to live" (often shortened to the simple statement, "please visit, but don't stay"). Twenty-seven years later, this sentiment was echoed by Oregon's Governor John Kitzhaber when he told *The Oregonian*, "If I had the power, I'd turn off the spigot and keep Oregon as it is today."

Thus, the Oregon model is intended to and does limit growth, regardless of consumer preferences or citizens' desires. For example, Metro recently began advocating initiatives that are designed to stop regional government spending on highway and other built-environment construction. Its stated reason: Such initiatives are necessary to stop "sprawl." Its real reason: Such initiatives are necessary to stop growth. These no-growth initiatives advance earlier efforts by Metro Director, Mike Burton, to require all residents and businesses in the Portland area to pay a "transportation utility fee." Such a fee, according to Mr. Burton, "recognizes that transportation is truly a public utility like water, sewer, telephone and electricity." The difference, of course, is that people pay for the water, sewer, telephone, and electricity they actually use, while Metro wants the transportation fees for light-rail lines that few use and that have been repeatedly rejected by voters.

Measure 7 is a direct result of a grassroots rebellion against the excesses of Smart Growth policies as practiced in Oregon. I predict that within two years, possibly less, Oregon will no longer be the poster child of "Smart Growth" truths; instead, it will be the poster child of "Smart Growth" fictions.

And Oregon is not the only state adversely impacted by implementation of Smart Growth policies and programs. Exhibit 8 discloses the concern of many members of the House of Representatives of the state of Washington. These concerns echo those of a majority of Oregonians: 1) increased congestion in urban areas, 2) increased housing costs in urban areas, 3) decreased economic development in rural area, and 4) an ever increasing intrusion by state and local governments into the everyday lives of ordinary citizens seeking to use and enjoy their property.

Several Congressional members have expressed their grave concerns over the Legislative Guidebook's apparent focus on avoiding the "just compensation" requirements of the Fifth Amendment. The adverse impact of the proposed regulations on

small businesses and the lack of broad-based participation in the development of the Guidebook are also mentioned as areas of concern. (Please see Exhibit 9—a letter to Secretary Mel Martinez signed by 21 Congressmen.)

Solution

The costs to the American public if the policies advocated in the Legislative Guidebook are implemented will be enormous, in terms of economic decline, litigation, and impact on civil rights. Further, many key stakeholders were left out of the process, and the document has been carefully ideologically crafted in such a way that no professional or academic authority who disagreed with it, and/or even stated a different viewpoint, was cited.

To correct the bias and redress the imbalance evident in the Legislative Guidebook, I believe it essential that further funding be enjoined and the Community Character Act be tabled until there has been an opportunity for additional public hearings at which opposing viewpoints and concerns may be presented for discussion and inclusion in the final product. I urge this Committee to take such action before state and local governments begin to believe that the silence of Congress means the blessing of Congress.

If the fast track the project is now on is not blocked, literally millions of dollars in actual costs may be inflicted on the American public at a time when we can ill afford it.

APPENDIX I

Following is a brief summary of constitutional infirmities of the Guidebook.

The Guidebook is a collection of model statutes designed to completely overhaul existing land use planning laws, replacing local control over economic and land use planning with federally crafted and state mandated standards. The Guidebook represents an effort to impose upon all 50 states land use regulations developed at the federal level. Under the Guidebook,

- Model statutes are presented for states to adopt—these model statutes often direct state action. For example, model statute 9–201 states that the state Department of Transportation shall adopt and implement a transportation demand management program. The model statute then provides specific details of what shall be mandated under such a program. By adopting the model statutes, a state is subjecting itself to the mandates and policies of the federal government.
- Uniform national standards have been devised that include technical specifications even for such traditionally local issues as parking and landscaping. (8–101)
- The state planning agency must coordinate state programs with the federal government. (4–102(2))
- The practices of a small minority of states are recommended for adoption by all states—for example, the Guidebook recommends and authorizes amortization of non-conforming uses while currently only eight states authorize even a limited form of what the Guidebook recommends. (8–502)

Expansion of regulatory power

The regulatory power of state governments over local governments, as well as the regulatory power of local governments over individuals and businesses, is greatly expanded. Model statutes, drafted to micro-manage and control small businesses, developers and individual homeowners, have the potential to impose serious financial hardships. Under the Guidebook,

- No local comprehensive plan or significant amendment thereto can be adopted by a local government unless it has been reviewed by the state. (7–402.2)
- Model statutes confer broad regulatory power in "local governments"—local governments being broadly defined as "any county, municipality, village, town, township, borough, city or other general purpose political subdivision." (3–101) This means, for example, that New York County, New York City and the Borough of Manhattan could all regulate land use in Times Square.
- Additional layers of bureaucracy are created—for example, allowing local control of wetlands in addition to the state and federal controls. (9–101(2))
- A single state planning agency is created and has the responsibility for creating a comprehensive plan addressing the economic, social and physical development of every community in a state. (4–102)

- A State Futures Commission is created in order to formulate a "Strategic Futures Plan" to present to the state legislature—a discussion of and recommendations concerning economic, demographic, sociological, educational, technological and related issues affecting the state and each local community. (4–201(7))
- State agencies are given approval authority over local government regulatory plans—this could violate state constitutions, like Georgia's, that give zoning authority directly to counties and municipalities. (7–402.2)
- State legislatures must require local governments to draft ordinances to mandate that virtually all employers adopt and implement a commute trip reduction program which must include, among other things, designation of a transportation coordinator, annual reporting to local authorities and implementation of transportation measures, such as providing subsidies for transit fares and permitting the use of the employer's vehicles for carpooling. (9–201)
- Local governments can to require a site plan—an often expensive, detailed scaled drawing depicting development or use-prior to approval of any and all development permits. (8–302(1))
- Local governments are encouraged to adopt zoning ordinances that promote the use of transfers and purchases of development rights, with the goal of frustrating efficient private growth. (p. 9–56–57; p. 9–64)

Unconstitutionality of Guidebook policies and model statutes

Many of the model statutes are constitutionally questionable—indeed, the Guidebook offers several warnings of possible constitutional challenges and offers tips on drafting model statutes in order to skirt potential litigation. (e.g., p. 8–178) The following are just some examples of the Guidebook's trampling of constitutional protections.

First Amendment:

- Local governments are given sweeping power to regulate individual businesses. Among other powers, model statutes expressly authorize local governments to regulate the "location, period of display, size, height, spacing, movement and aesthetic features of signs, including the locations at which signs may and may not be placed." (8–201(2)(h)) This allows local governments virtually unlimited control over the ability of a businessperson to advertise in his or her place of business. The local government has the ability to control even the content of the sign.
- A business can be found criminally liable for violation of an ordinance regulating the aesthetic content of its sign. (11–302; 8–201(3)(m))

Fourth Amendment:

- Administrative warrants can be issued to search private property if the search is consistent with a valid administrative scheme, such as housing safety—probable cause is not required. Inspection warrants issued pursuant to an administrative scheme can be easier to get than criminal search warrants. (11–104(4); see also Camara v. Municipal Court, 387 U.S. 523 (1987) and See v. City of Seattle, 387 U.S. 541 (1987))
- Local governments are authorized to obtain inspection warrants for suspected land violations without first notifying the owner of the property that the property is the subject of an investigation. (11–101(4)–(7))
- Local governments may obtain an inspection warrant based upon any allegation that someone is in violation of land regulations—such an allegation may be made by anyone, such as neighbors, nearby businesses or other "interested citizens." (11–101(6))
- Local officials and police are exempted from common law and statutory trespass when they are on owner's property to inspect possible land use violations. Property owners lose the right to exclude others from their property. (11–101(5))
- Inspection warrants can be sought for any land use violation—local officials could rezone high crime residential areas enabling code enforcement officers (accompanied by the police) to search every building in the rezoned area for suspected violations. (11–101(4))
- While the local police are not authorized to participate per se in the inspection of property for land use violations, the model statute does allow them to accompany local code enforcement personnel and enter and inspect the property without such entrance into the property being considered a search by the

police. (11–101(5)) This could allow the police to surreptitiously gather evidence for possible criminal charges against a property owner.

Fifth Amendment:

- The use of moratoria is encouraged—providing local governments with a tool to ban development for a specified period of time, depriving property owners of the right to develop their property. (p. 8–183) However, moratoria are not permitted in communities adopting a "traditional neighborhood" smart growth plan. (p. 8–184)
- There is no meaningful time limit for moratoria when the local government still perceives that a need for moratoria persists. (8–604(8)(b))
- The designation of any area as a "Design Review District," is allowed—these areas are then subject to mandated interior and exterior standards of design. (9–301)
- A "Certificate of Appropriateness" is required before a business owner in a Design Review District can make any changes to the interior or exterior of his or her business—a process involving layers of bureaucracy and subject to the personal opinions of government officials on design, taste and appropriateness. (9–301(7))
- Local governments are empowered to designate undeveloped private land as an Historic Landmark that has archeological or cultural interest and require a Certificate of Appropriateness before the land can be developed. (9–301(1)(g))
- Local governments can define any "lands and/or water bodies" that "provide protection to or habitat for natural resources, living or non-living" as Critical and Sensitive Areas and can regulate and prohibit land use in these areas without limitation. (9–101(3)(c); 9–101(5)(f); p. 9–9)
- The Guidebook authorizes zoning of land uses and structures within the local jurisdiction without regard for current uses. (8–201(3))
- Current subdivisions or resubdivisions of land that have not been approved by the local government pursuant to the Guidebook's recommendations are considered void. (8–301(4)(b)) Subdivision includes any land that is divided into two or more parcels for development or use. (8–101)
- Local governments are permitted to halt all profitable uses on a land without just compensation. (9–402(1)) The Guidebook authorizes compensating the owner for the "use" only, not for the value of the land. (9–402(5)(b))
- Local governments can prevent development or use of land by forcing the owner to accept development rights on another parcel of land (9–401). This violates the federal and state constitutions that demand that just compensation be paid in money. (p. 9–43)
- The Guidebook criminalizes and allows imprisonment for anyone who intentionally or knowingly violates any land development regulation, including, for example, the failure to conform to design standards set for a Design Review District or the failure to establish a commute trip reduction program. (11–302; p. 11–37)
- Local governments can demand dedications in exchange for the issuance of a building permit without proper justification. The model statute only requires that a dedication be in "reasonable proportion" to the demand for such improvements that are "reasonably attributed" to the proposed development. (8–601(4)) The Supreme Court, however, explicitly rejected such a reasonable relationship test, stating that, "[W]e do not adopt [the reasonable relationship test] as such . . . We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (Dolan v. City of Tigard, 512 U.S. 374, 391 (1994))
- The Guidebook promotes the amortization of non-conforming uses, structures and signs over time. Essentially, the local government can pass an ordinance making certain current uses of property illegal—thus rendering the current uses "non-conforming" with new regulations. The local government then sets a timeframe for the phase-out or "amortization" of the non-conforming uses. (p. 8–109) This allows local governments to get rid of unwanted uses and/or property owners without having to provide any compensation. The Guidebook specifically names signs as easy targets for amortization (8–502(4)). Such am-

ortization provisions violate several state constitutional and statutes. (p. 8–119)

Tenth Amendment:

- The model statutes in the Guidebook are directives for state action—for example, Section 4–203 states that the state planning office shall prepare a state comprehensive plan and directs the state to undertake supporting studies in 16 different areas in its preparation of its comprehensive plan. (4–203(3)) By adopting the model statutes, a state is subjecting itself to the mandates of the federal government.
- Uniform national standards hinder the ability of developers to work with local governments to plan and build developments. For example, even if a developer achieves local approval on a project, the developer will be subject to possibly prohibitive uniform national standards that are predetermined on the federal and state level, having little or no relevance in the developer's community. (8–101)

Fourteenth Amendment:

- The model statute on historic and design review districts provides for local governments to arbitrarily designate any area as a "Design Review Districts" and subject property owners in just those areas to mandatory standards on the design and aesthetics of the interior and exterior of their property. (9–301) This amounts to an intentional difference in treatment and a lack of rational basis for that different treatment.

APPENDIX II

In a letter to Senator Chafee, the APA is telling the Senate, and by extension, the House, that 78% of persons participating in an APA-sponsored survey believe "it is important for the 107th Congress to help communities solve problems associated with urban growth." Moreover, according to the APA letter, "three-quarters of voters also support providing incentives to help promote smart growth and improve planning." In making these statements, the APA is relying on a survey conducted by Belden Russonello & Stewart of Washington, D.C., presumably at APA's behest. A copy of this survey is attached as Exhibit 10.

Even a cursory review of this survey reveals it is "cooked" (leading questions that everyone would answer "correctly"; gross underrepresentation of minorities; overrepresentation in the high income and low income brackets; no disclosure of the costs of the policies labeled as "smart growth" in survey question 14), with the consequent "cooking" of the data in order to support APA's predetermined outcome.

For example, the survey in no way supports the statement that "78% believe it is important for the 107th Congress to help communities solve problems associated with urban growth." The survey does not even mention the 107th Congress. In fact, the only section that addresses federal government intervention is the one that asks, "how much confidence do you have in each of the following to make the best decision on land use issues affecting your area?" Those expressing "a great deal of" or "some" confidence in city government represented 61% of those surveyed. County government also received a "great deal-some" confidence level from 61% of the survey group, while state government did even better—62%. The entity receiving the most "confidence" votes was neighborhood associations and civic groups—67%. On the other hand, the federal government received only 46% of the "great deal-some" confidence choices. This figure is considerably less than the 78% claimed by the APA. In fact, 52% of those surveyed responded they had "not very much" (21%) or "very little" (31%) confidence in the federal government's ability to make the best land use decisions.

EXHIBIT 1

Policy Guide on Takings

Land Use Regulations and the "Takings" Challenge

Adopted by a Chapter Delegate Assembly
Ratified by the APA Board of Directors, April 11, 1995 - Toronto, Canada

Background: the "Takings" Issue

The "takings" issue is addressed in the Fifth Amendment to the U.S. Constitution, which reads in part, "nor shall private property be taken for public use, without just compensation." In the context of the times that language was clearly directed toward the actual seizure of private property for public use. Modern methods of eminent domain embody the principles set forth in the Fifth Amendment, allowing governmental bodies to claim private property when necessary but requiring that those entities pay "just compensation" when they do so.

About seventy-five years ago, the U.S. Supreme Court extended that principle beyond the physical seizure of property, holding that "The general rule at least is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a 'taking.'" Although the case involved was complex, the concept is not. Clearly if a government uses regulation to accomplish what it should do through eminent domain, the result should be the same as if the government had used eminent domain. For example, if the government were to issue regulations requiring that landowner permit a portion of her land to be used as part of a public road or that another landowner permit the public to enter onto his property to use it as a recreation area, the net result for the property owner is about the same as if the government had physically seized the property. Most rational citizens would support the affected landowner in a claim for compensation.

For roughly sixty years, if a court determined that a regulation amounted to an unconstitutional taking, it would simply invalidate the regulation--thus leaving the property owner free to do as he or she could have done before the new regulation was imposed. That was certainly a reasonable remedy for the local government--its unconstitutional action was simply made void, without other serious cost or penalty to the community or its citizens. The local government could then adopt a new regulation, presumably one that would respond to the court's adverse findings on the previous regulations. When that remedy was granted relatively swiftly and not appealed, it was also a reasonable result for the landowner. As delays in litigation have become more common (one "takings" case was in court for nine years before the U.S. Supreme Court more or less resolved it), the remedy of overturning the regulation became less acceptable to landowners. In that context, attorneys for landowners began asking the courts to treat an unconstitutional regulation as being equivalent to an action in eminent domain--thus requiring that the local government buy the regulated land. The Supreme Court in 1981 finally adopted a compromise position, accepting the notion that some damages might be due to the landowner but giving the governmental entity a choice between two options: buying the land as it would under an eminent domain proceeding; or repealing the unconstitutional regulation and then compensating the landowner for the loss of use of the property while the regulation was in effect. That is the law today.

Although that is a far less burdensome rule than an absolute mandate that a local

government buy property, even the mandate that governments pay for a temporary "taking" is a sort of unfunded mandate. When a governmental agency enters into eminent domain proceedings, it typically does so in the context of a capital project budget (such as one for the construction of a road) and it has funds available to pay for the land taken. When it adopts a new regulation, a governmental agency is unlikely to set aside funds to buy the regulated property. Thus, a sudden court order requiring that it pay for land that it thought that it was simply regulating can be an unpleasant fiscal surprise for a governmental entity and its taxpayers.

Seeking at times to redress unfair actions of government and at other times perhaps to profit from an opportunity, landowners have brought many "takings" claims against entities of government. Recognizing the implications of such cases, the courts themselves have generally been quite cautious in finding "takings."

To date the Supreme Court has established four clear rules that identify situations that amount to a taking and one clear rule that defines situations that do not. The court has held that regulations simply intended to prevent or eliminate a nuisance cannot be considered a taking. It has found "takings" in the following circumstances:

1. where the landowner has been denied "all economically viable use" of the land;
2. where the regulation forced the landowner to allow someone else to enter onto the property (in this case a cable company, which wanted to attached its cables to an apartment building);
3. where the regulation imposes burdens or costs on the landowner that do not bear a "reasonable relationship" to the impacts of the project on the community; and
4. where government can equally accomplish a valid public purpose through regulation or through a requirement of dedicating property, government should use the less intrusive regulation, for example, prohibiting development in a floodplain property.

The first of those principles is one of fundamental fairness. The second simply reinforces principles against trespass that have evolved from the common law and that are reinforced by the Fifth Amendment. The third simply mandates that a community engage in good planning and then adopt regulations that uses that plan to apportion fairly the burdens and benefits of land development. The last of these is simply common sense. Although some planners have had some concern about the precise language used by the Supreme Court and about some of the facts of particular cases, the American Planning Association supports these reasonable principles, as do most of its members.

The Supreme Court has also said that were a regulation is intended merely to prevent a nuisance, it should *not* be considered a taking. Although that rule is some comfort for regulations that prevent serious air and water pollution that would clearly amount to nuisances if left unchecked, the police power has for seventy years extended beyond the mere prevention of nuisances. No reasonable court would hold that the definition of nuisance would include a high-rise apartment building or even a convenience store located in the middle of a neighborhood of single family homes; under the police power, however, local governments carry out the wishes of homeowners by preventing such uses in single-family neighborhoods. Thus, this lone exception to the "takings" doctrine is logical and useful but not sufficient to protect the scope of normal activities carried out by many local governments to protect local citizens and property owners from unwanted intrusions into their neighborhoods.

Background: The Police Power

During the same period that "takings" law has evolved in the courts, so has the "police power." The concept of the police power is essential to government. As generally interpreted in the U.S., the police power is the right of government to interfere with private activity (or the use of private property) for the protection of

the public health, safety and general welfare. Zoning is the most common use of the police power as it affects land, although related subdivsion regulations and building codes are also important exercises of the police power. The U.S. Supreme Court upheld the principle of zoning and expressly held that zoning did not amount to a taking just a few after determining that some regulation might go so far as to be a taking. In thousands of state and federal court cases, the courts have upheld the right of local government to intervene in private activity to protect the public health, safety and welfare.

It is the police power that allows the government to require a landowner to clean up a cesspool leaking onto a neighbor's property or to remove a junkpile that attracts vermin to a residential area. It is under the police power that a local government adopts zoning regulations that prohibit the operation of junkyards and auto repair shops in residential neighborhoods. Under the police power most local governments prohibit landowners from distracting motorists with flashing signs that look like traffic signals and that those same governments prohibit noisy or noxious businesses near residential areas.

As our society has become more populous, with more people living relatively close together, the police power has become more important. It is a sort of civilizing agreement among humans living in a community that allows them to live in peace. Communities depended upon the police power to separate heavy industry from homes and businesses during the first century of the industrial revolution. Today, other police power regulations require that industry eliminate most pollution, thus making it a better neighbor and making separation less important.

By the mid 1950s the Supreme Court recognized that government could legitimately use the police power to make a city "beautiful as well as healthy," and it is under that principle that today most communities prohibit billboards and large flashing signs in residential areas. The police power and regulatory "takings" law are not in conflict at all. They are complementary bodies of law that have evolved together. The "takings" decisions of the U.S. Supreme Court simply set limits on the extent of police power regulation. That is, of course, one of the important functions of courts in our three-part system of government.

Proposed "Takings" Legislation

Virtually every state in the country, as well as the U.S. Congress, has considered various forms of "takings" measures within the past two years. While ten states have passed some form of "takings" legislation, most have been rejected due to the onerous financial burdens that would have been placed on states and communities, and because states have recognized the sufficiency of existing constitutional protections. Some legislation proposed within the past several years has been the result of some legitimate concerns regarding the rights of property owners, an issue discussed elsewhere in this paper. Much of this legislation, however, is really anti-regulation legislation clothed in the fabric of private property rights. Care must be taken to distinguish between the two.[1]

The most common types of proposals are these:

- Compensation for reduction in economic value. Under these proposals, a governmental agency would be required to compensate a landowner for any reduction in value resulting from government regulation; most establish a baseline level of impact and require compensation for a loss in value exceeding that threshold (the baseline in one proposal in Congress is 10 percent). Some proposals would actually require that government buy the property, even if the loss in value is only slightly about the baseline, such as a 12 percent reduction in value.
- Economic assessment reviews. Under these proposals, any government proposing new regulations would be required to develop thorough economic impact statements, identifying and valuing the impacts of the proposed regulations on private property.

These proposals have a certain amount of surface appeal. They are extremely dangerous proposals, however--proposals that could destroy the quality of life in communities in the United States and bankrupt local and state governments. If

adopted, they would also contribute significantly to future federal deficits.

Why? Consider the concept of compensating a property owner for any loss in economic value resulting from government regulation. First, remember that if the regulation denies the property owner "all economically viable use" of the property, the Supreme Court has already provided a remedy for that property owner. Thus, the extreme cases have already been resolved.

For other cases, this approach poses many problems. From what value is the loss to be measured? Every regulation that limits the use of property in any way has some theoretical impact on the value of that property. If the city refuses to let your next door neighbor store junk cars on her property, should she then be compensated for the difference in value between a commercial junkyard and a piece of residential property? If that becomes the legal rule, the city will probably have to allow the junkyard next door in order to avert bankruptcy. Should a property owner who wants to build high-rise apartments in a single-family neighborhood be compensated because he is not allowed to do so? Assuming that he is allowed to build a house, just like everyone else in the area, has he really been hurt? What about a regulation that prevents grocery stores near residential areas from selling liquor? The sale of liquor is very profitable for grocery stores, with a much better mark-up than most of the grocery items in the store. Should the store be compensated for the theoretical loss of business, just because it cannot sell liquor? Such rules theoretically reduce the value of property and would thus be subject to the compensation requirement under "reduction in value" approaches. It is important to remember in considering such arguments that a principal purpose of zoning is to protect property values.

Further, one needs to remember that property owners pay nothing to government for the gains that they enjoy when their property benefits from land use regulation. If a government increases the value of property by rezoning it from a zone allowing only farming to one permitting shopping centers and the property owners pays nothing for that, should the government have to pay that same property that owner if it theoretically reduces the value of the shopping center by refusing to allow the construction of a gasoline station at the entrance corner? One way to fund efforts to compensate landowners for every reduction in value caused by regulation is also to charge landowners for every increase in value caused by government action, such as regulating the use of adjacent property or construction a new highway. Most property owner groups, however, oppose this funding mechanism; they are unwilling to pay for their gains but they still expect to be compensated for their losses. Planners are not enthusiastic about such a system of payments for gains and benefits because it would require a complex bureaucracy to administer. The more conservative, easier approach is to continue the system that has been in effect for the last seventy years with some enhancements -- providing relief for those who suffer great hardships but otherwise allowing property owners and the free market to deal with ups and downs without a lot of government intervention.

The Supreme Court, which has a majority of members who are committed to the protection of property rights, has adopted a rational approach to this issue. It has held that where a property owner is denied "all economically viable use" of a property, that falls within the "takings" doctrine. It has refused, however, to accept some property owners' arguments that the should be allowed the "most profitable use" of their property, regardless of the effect on neighbors and neighboring properties. Landowners have argued that government is "taking" their property because they cannot build on land that has been under water for hundreds of years and which they acquired essentially for free as part of the purchase of a larger parcel that also included dry, useable land. Other landowners have argued that the denial of a right to build a liquor store or an apartment building in the middle of a single-family neighborhood amounts to a taking. Landowners have gone so far as to argue that requiring front yards in residential neighborhoods or requiring parking spaces for cars amounts to an unconstitutional taking. Not surprisingly, courts have rejected such frivolous claims. Now advocates

for some of these property owners want Congress to do what the courts have refused to do.

Cases about percentage losses in value invariably turn into battles of "your expert against my expert." The landowners' expert quite naturally testifies that the land is very valuable commercial property if only zoning were not in the way. The city's expert equally naturally testifies that the land sits in the middle of a residential area, has always been zoned residential and should be valued only as residential property. Then a judge or jury has to decide which expert to believe. Such a system typically enriches lawyers but not landowners. The Supreme Court's rule is better. It asks simply, "does the landowner have an economically viable use under the regulations?" That is a question that is much simpler to answer and one that judges and juries can evaluate more easily on their own. Because it is an easier question to answer, it is less likely to lead to litigation.

What is the ultimate effect of a requirement that the government compensate landowners for losses in value? In all probability it will be the abandonment of police power regulations that affect property--regulations that limit flashing signs in residential areas, that ban billboards in many areas of town, that ban junk cars and open-air auto repair in residential neighborhoods, that limit the location of bars and adult businesses, and that protect residential neighborhoods and shopping districts from intrusions by heavy industry. Local governments simply cannot afford to take the risk of having to pay compensation to everyone who claims that their property values have been reduced because they cannot have their very own convenience store with gas and beer, located at the end of a quiet residential cul-de-sac. If we allow that property owner to have a convenience store, however, we adversely affect the quality of life and the property values of all the families living on that cul-de-sac.

There are important issues of social equity to consider here. The wealthiest property owners may have little to fear from an abandonment of zoning and other land use controls. Upper-income neighborhoods in unzoned Houston are well-protected by deed restrictions. It is those in the middle class, those who are affluent enough to own homes but not affluent enough to control their own neighborhoods, who depend particularly on zoning to protect the value of their homes, largest investment that most of them will ever make. Those even further down the economic ladder depend on land use regulations to provide some semblance of a safe and sanitary neighborhood in which they can rent a place to live. A system that results in a widespread reduction in the amount of regulation in reaction to the potential costs of compensation schemes will harm all property owners, but they will harm most those who have the least.

The proposed economic impact analyses appear to fall in the latter category, spending government money nonproductively. Planners should, of course, recognize the economic impacts of plans -- the economic impacts on landowners, on residents, on the public treasury and on the taxpayers who support it. That is an essential element of comprehensive planning. Asking planners to write a separate report about the economic impacts of regulations, particularly as they affect landowners, however, goes beyond good sense and creates unnecessary bureaucracy. That is like requiring an environmental or social impact statement on a plan. A good plan should be based on economic, social, environmental and other factors that influence the community and its future, but is neither necessary or useful to write a separate "impact" report on each of those issues. Producing the report accomplishes nothing to protect the landowner. All that it does is to take time and cost money. There is no point in that. Good planning dictates that planners and others involved in developing plans and regulations understand the general economic consequences of their actions. Specific relief for affected landowners should be addressed separately.

Conclusion

The American Planning Association strongly opposes most of the proposed "takings" legislation that its representatives have seen. Many of the bills

introduced to date have the potential to bankrupt various entities of government. Many would add to bureaucracy and slow down the development process without really protecting private property. If bills introduced at the federal level are enacted, they would encourage state legislatures to do the same; in fact, by the date of the adoption of this policy, APA was aware of as many as 41 copy-cat bills in state legislatures.

That does not mean, however, that APA believes that the government is always right or that landowners should be left without remedies. Like individuals, governments sometimes make mistakes--mistakes that may have an unfair impact on a particular property owner. Although the democratic process generally ensures that the purpose of government regulations is a valid one, those regulations sometimes go awry in the implementation. Landowners and other citizens should absolutely have adequate and fair remedies to deal with both mistakes and intentional acts that result in unfair hardship for particular individuals.

The collective political forces that have joined in support of "takings" legislation have grossly distorted both the frequency and the intensity of the occurrence of hardship caused by government regulations. There is no question that such hardship situations can occur. Groups seeking horror stories who canvas the entire country can find such stories. When confronted with a request for details, however, advocates for some of the radical "takings" legislation are unable to provide details or documentation.

The fact is that in the average community in the typical state, the system is working well. Similarly, although there are some hardship situations under some federal regulations, most property owners function quite nicely under federal regulations and most also benefit from federal regulations that prevent other property owners from generating excessive air or water pollution. Most property owners accept the regulations imposed on their property and recognize that they must accept some limitations so that their neighbors will accept some limitations and they can all live together in relative harmony. Property rights advocates use a national collection of isolated horror stories in support of their arguments for drastic remedies to the so-called "'takings' problem." They are proposing to "kill a fly on a picture window with a sledge hammer." Viewed differently, they have a long-held "solution" (the virtual elimination of government regulation of property) and they have simply been searching for a problem that they can use as an excuse for implementing that solution. The problem is that the proposed solution will do extraordinary harm to everyone who lives in communities, allegedly in order to remedy the problems of a few hardship cases.

Property rights advocates are waging a guerrilla war of sound-bites, misleading "spin-doctoring" and power politics which have characterized governments at every level as evil empires of bad intent. APA members, many of their professional colleagues and communities across the country, have been placed in a defensive mode, outflanked by advocates who wrap themselves in the flag and the distorted appearance of constitutional rights. Ultimately, a legitimate analysis will show that the vast majorities of communities and regulators take very seriously their responsibilities of protecting both the public interest and individual property rights.

The issue is as much one of remedies as of substance. Planners share with property owners concern about legitimate disagreements that may take years to resolve. Many of the cases filed in court (and sometimes even decided) as "takings" cases actually involve other Constitutional issues, such as substantive and procedural due process. "Takings" has become a sort of shorthand call for help.

At about the time that the U.S. Supreme Court first decided that a regulation might amount to a taking, a group of experts were preparing what would become model zoning laws for the entire country. Recognizing the possibility of occasional hardships and the necessity of providing prompt and effective remedies, those early legislative drafters included in the zoning legislation local variance and

appeal procedures. Although those procedures are at times abused, the principle that there should be a simple and effective remedy where regulations create an unnecessary hardship. The problem is that today's regulatory environment has become much more complex, typically involving several sets of regulations besides zoning and often involving multiple entities of government. Bizarre hardship cases sometimes occur simply because someone gets caught between two different sets of regulations, adopted for two sets of good but very different reasons. Property owners are understandably frustrated when caught between conflicting government mandates or when confronted with regulations that are unreasonable as applied to them; the lack of an effective remedy increases that frustration.

That solution is not, however, to subject every government that tries to protect neighborhoods from blight to potential financial penalties. Placing at risk the police power regulations that make a complex and relatively compact society livable will impose incredible penalties on all who live in communities as a remedy for the unique problems of a few. Clearly less drastic remedies are needed. Although the details of such remedies are left to a related report of the American Planning Association, this Policy Guide outlines the principles that should guide the development and implementation of such remedies.

Adopted Policies

1. The American Planning Association and its chapters support the evolving law in this country that clearly recognizes both the importance of the police power to the protection of the public health, safety and welfare, and the limitations imposed upon that power under the U.S. Constitution to protect property rights.
    1. The American Planning Association and its chapters support property rights as guaranteed by the U.S. Constitution and the land use regulations that protect those rights for the benefit of all property owners.
    2. The American Planning Association and its chapters generally oppose "takings" legislation that expands the "takings" doctrines established by the Supreme Court to the detriment of the ability of local, state and federal governments to protect their citizens under the police power.
    3. American Planning Association and its chapters believe that all regulation of land should be consistent with locally adopted comprehensive plans, approved state plans, and/or federal agency studies and plans (as applicable to the level of regulation). Comprehensive plans should address economic social, environmental and other issues affecting landowners, taxpayers and residents, and affecting the larger community.[2]
    4. Because economic issues should be and generally are addressed in the comprehensive planning process, along with other issues, the American Planning Association and its chapter oppose legislation requiring the preparation of separate economic (or other) impact statements on proposed new regulations or laws.[3]
2. The American Planning Association and its chapters support regulations that avoid "takings" and other unnecessary and/or unintended hardships for particular landowners; they also support provisions that offer landowners appropriate relief, or, in appropriate cases, modification of regulations to accomplish that purpose.

At a minimum:

1. All entities of government imposing regulations under the police power should include in those regulations procedures for fast, inexpensive, and effective review of hardship situations by a body with the authority to grant appropriate relief, including the approval of development and the issuance of necessary permits and variances.
2. States should review their legislation to ensure that local governments have full authority to accomplish the goals of 2.A.
3. States should assign to existing bodies the authority to review and grant relief from hardships created for property

owners by conflicts among the regulations of multiple entities; where such bodies do not exist, states should create them.[4] Such bodies should have the authority to grant relief that may include the approval of development and the issuance of necessary permits.

4. Congress should create or assign existing bodies with the authority to review and grant relief from hardships created for property owners by conflicts among the regulations of multiple federal entities or by federal regulations when considered in combination with state and local regulations. Such bodies should have the authority to grant relief that may include the approval of development and the issuance of necessary permits.

Optimally:

3. Congress should authorize and federal agencies should implement methods for quasi-judicial, consolidated appeals of matters affected by a combination of state and federal regulations.

1. The American Planning Association and its chapters recognize the need for fairness to all persons and entities of government under laws and regulations imposed by all levels of government.

At a minimum:

1. Laws or statues should make reference to the state or federal constitutional principles from which they derive their authority.
2. Regulations should make reference to the law or statue from which they derive their authority and should be applied and construed in accordance with those statues.

Additionally:

1. Regulations affecting the use and development of land should be limited in scope to avoid unintended effects on land values except as necessary to carry out the public purpose of the regulations under the police.[5]
2. Regulations affecting the use and development of land should permit reasonable flexibility to minimize hardship. In particular, regulations should permit alternative methods of compliance that may reduce or eliminate the economic costs of compliance while preserving the intent of the regulations.
3. Regulations affecting the use and development of land should be adopted only after a review process offering the opportunity for significant participation by affected governmental entities and persons, including property owners.
4. Regulations affecting the use and development of land should include appropriate procedural due process.
5. Economic analyses of regulations conducted in the context of the comprehensive planning process (or in any other context) should recognize the economic benefits of the regulations to other property owners and the community at large, as well as any economic burden to a particular property owner(s).

1. Although the American Planning Association believes that only a small percentage of landowners may find their land subject to a regulatory taking under existing Constitutional doctrine, the American Planning Association and its chapters support efforts to develop appropriate and effective remedies for all such landowners, with adequate consideration of the impacts of such remedies on government.
    1. The first step to limiting the cost of such remedies is by alleviating as many hardship situations as possible through fast, appropriate, and effective relief provisions established in accordance with

principles set out in above. (See #2)
2. Because of the dampening effect that monetary remedies may have on the legitimate exercise of the police power, the American Planning Association supports non-monetary remedies that are consistent with the purpose of the regulations.[6]
3. In that limited number of cases where monetary remedies may be necessary or appropriate, the American Planning Association supports those remedies that are least costly to taxpayers.[7]
4. The American Planning Association will, as part of its effort to develop model state land use planning legislation, offer model statues with innovative administrative mechanisms for providing landowners relief from land use regulations.

Ways to Avoid Potential "Takings" Claims

There are a number of different ways in which communities concerned about fairness and balance for all citizens in addressing the "takings" issue can protect themselves against potential "takings" claims. These include the following:

1. Establish a sound basis for land use and environmental regulations through comprehensive planning and background studies. A thoughtful comprehensive plan or program that sets forth overall community goals and objectives and which establishes a rational basis for land use regulations helps lay the foundation for a strong defense against any "takings" claim. Likewise, background studies of development and pollution impacts can build a strong foundation for environmental protection measures.
2. Institute an administrative process that gives decision-makers adequate information to apply the "takings" balancing test by requiring property owners to produce evidence of undue economic impact on the subject property prior to filing a legal action. Much of the guesswork and risk for both the public official and the private landowner can be eliminated from the "takings" arena, by establishing administrative procedures for handling "takings" claims and other landowner concerns before they go to court. These administrative procedures should require property owners to support claims by producing relevant information, including an explanation of the property owner's interest in the property, price paid or option price, terms of purchase or sale, all appraisals of the property, assessed value, tax on the property, offers to purchase, rent, income and expense statements for income-producing property, and the like.
3. Establish an economic hardship variance and similar administrative relief provision that allow the possibility of some legitimate economically beneficial use of the property in situations where regulations may have an extreme result. These procedures help to avoid conflicts in the first place by allowing for early consideration of all alternatives that may be satisfactory to all concerned. However, relief should be granted only upon a positive showing by the owner or applicant that there is no reasonable economic use of the property as witnessed by evidence produced as outlined in No. 2, above. Remember that the landowner has the burden of proof on hardship and "takings" issues.
4. Take steps to prevent the subdvision of land in a way that may create economically unusable substandard or unbuildable parcels. Subdivsion controls and zoning ordinances should be carefully reviewed, and should be revised if they permit division of land into small parcels or districts that make development very difficult or impossible--for example by severing sensitive environmental areas or partial property rights (such as mineral rights) from an otherwise usable parcel. Such self-created hardships should not be permitted to develop into a "takings" claim.
5. Make development pay its fair share, but establish a rational, equitable basis for calculating the type of exaction, or the amount of any impact fee. The U.S. Supreme Court has expressly approved the use of development conditions and exactions, so long as they are tied to specific needs created by a proposed development. The use of nationally accepted standards or studies of actual local government costs attributable to a project, supplemented by a determination of the actual impact of a project in certain circumstances, may help to establish the need for and appropriateness of such exactions.
6. Avoid any government incentives, subsidies, or insurance programs that encourage development in sensitive areas such as steep slopes, floodplains, and other high-hazard areas. Nothing in the Fifth Amendment

requires a government entity to promote the maximum development of a site at the expense of the public purse or to the detriment of the public interest. Taxpayers need not subsidize unwise development. At the same time, consider complements to regulation such as incentive programs that encourage *good* development, when regulatory approaches cannot alone achieve necessary objective without severe economic deprivation. While not a legal requirement, such programs can help take the sting out of tough, but necessary, environmental land use controls.

SUMMARY

APA supports private property rights as guaranteed by the U.S. Constitution and the land use regulations that protect those rights for the benefit of ALL property owners.

APA strongly opposes "takings" compensation and assessment bills because they would:

1. increase bureaucracy and red tape at every level of government
2. slow the development process and result in a decrease in jobs
3. result in significant but unpredictable costs to the public treasury
4. add to regulatory confusion at the state and local levels. State and federal laws are inextricably linked. " De-coupling" these laws would be a nightmare!
5. result in a proliferation of federal, state and local lawsuits

Although drafted with the best of intentions, the "takings" legislation introduced to date does NOT protect private property owners from big government. Good intentions do not necessarily make good law.

These bills would make it harder to protect the property values of ALL Americans.

Beware of waivers: A dangerous compromise is being discussed. Since the government does not have the funds to compensate all the takings claims that are expected, waivers are being proposed. Landowners would be waived or exempted from the law or regulation that caused the "takings." The result would be chaos. Regulations that protect neighborhoods would be worthless if they are waived whenever a landowner or developer balks. Community protections would constantly be in jeopardy. These waivers could be devastating since there is no mechanism to judge their cumulative effect.

Please vote against legislative language that provides exemptions from regulations without considering cumulative effects of waivers.

Endnotes

1. Of the 10 states that enacted "takings" legislation, nine enacted assessment type bills. Ariz. Rev. Stat. ?? 37-220-23 (1992); Del. Code Ann. tit ? 605 (1992); Idaho Code ? 67-8001 et. seq. (Supp. 1994); Ind. Code Ann. ? 4-22-2-32 (Burns Supp. 1994); Missouri SB 588 & HB 10909 (1994); Tenn. Code Ann. 1-2 (1994); Utah Code Ann. ? 78-34a-1 et. seq., ? 63-90-1 et. seq. (1994); Wash. Rev. code ? 36.70A.370 (Supp. 1993); W. Va. code ? 22-1A-1 et. seq. (Supp. 1994); Miss Code Ann. ? 11-46-1, 17-1-3, 17-17-1, 41-67-15, 49-2-9, 49-2-13, 49-17-17 & 95-3-29 (1994). R. Freilich and R. Doyle, "Taking Legislation: Misguided and Dangerous," *Land Use Law and Zoning Digest,* 46, No. 10 (October 1994), pp. 3-6.
2. APA supports active participation by professional planners in preparing data and analysis for such plans and studies and in developing the comprehensive plan and regulatory programs. APA acknowledges the important responsibility of planning professionals to conduct thorough

research and analysis and provide decision-makers with appropriate policy options supported by this data and analysis. Planners also have a responsibility to give regulatory advice based on adopted plan policies.

3. Note that this addresses only the issue of preparation of such statements incident to the adoption of regulations or laws; the preparation of economic, environmental and social impact statements on particular projects in contexts is entirely appropriate.
4. Examples include the Oregon Land Use Board of Appeals, as well as hearing examiners, mediators and other non-judicial appellate processes in several states.
5. Where government can equally accomplish a valid public purpose through regulation or through a requirement of dedicating property, government should use the less intrusive regulation.
6. These may include such techniques as transfers of development rights, clustering, alternative uses, and land trades.
7. Those may include phased payments under a system of compensable regulations, fee waivers, long-term pay-outs, or other techniques that allow local governments to incur the costs of such remedies as the public benefits accrue.
8. Christopher J. Duerksen and Richard J. Roddewig, *Takings Law in Plain English*, 2nd ed. (Clarion Associates, Inc., 1994), pp. 41-43.

EXHIBIT 2

Policy Guide on Billboard Controls

Ratified by Board of Directors, Boise, Idaho, September 1989
Revised and updated, San Diego, California, April 1997
Ratified by the Board of Directors, San Diego, California, April 1997

FINDINGS

In recent years, planners have identified sign control as one of the most important yet troublesome problems facing local governments. Because of their size and their intrusion into many rural, residential, and scenic areas, billboards are of particular concern to many communities.

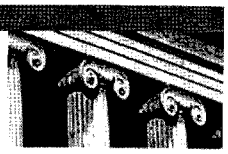
Many local governments have determined that billboard controls are necessary to protect and preserve the beauty, character, economic and aesthetic value of land and to protect the safety, welfare and public health of their citizens. Over the past two decades, hundreds of cities and counties have enacted new regulations to control billboards. Yet many communities find it impossible to enforce their billboard ordinances along highly-visible transportation routes because of special-interest provisions in the Intermodal Surface Transportation Efficiency Act, successor to the Federal Highway Beautification Act.

APA fully supports continuing provisions of these federal laws that require the states to control billboards adjacent to primary and interstate highways that receive Federal aid, including Federal highways located within cities and other local governments. The act imposes penalties on states that do not meet Federal standards. States that do not comply with Federal standards may lose 10 percent of their Federal highway funds. Not surprisingly, all states have legislation that implements the Federal Act.

Unfortunately, in 1978 Congress adopted an amendment to the Highway Beautification Act which ties the hands of local governments that want to remove nonconforming billboards along Federal highways. Before the amendment was adopted, local governments in many states could require the removal of nonconforming billboards along Federal highways, offering compensation through amortization under state and local police powers and not paying out public monies. The Act now requires local governments to pay billboard owners before a nonconforming billboard can be removed.

The Federal government is supposed to meet 75 percent of the cost of billboard removal, but Congress has not appropriated funds for this purpose since 1982. This is a major obstacle to billboard regulation because the removal of nonconforming billboards is essential to an effective billboard control program.

As a result, local governments face a dilemma. Although in many cases they can and do require the removal of other signs without cash compensation, they can require removal of signs along heavily-traveled federal-aid highways only if they pay compensation. That creates a philosophical dilemma and, in the absence of the 75 percent federal matching funds that were originally contemplated, it creates a very real fiscal one. At the same time, new billboards continue to go up on many of the same roads where the industry insists on being paid to remove other billboards. Ironically, a setback requirement included in the act and intended to keep billboards out of highway corridors in many rural areas has simply led to a



proliferation of super-billboards just outside those corridors, further despoiling many rural routes. In short, federal intervention intended to make highway corridors more beautiful has been manipulated by special interests to make it more difficult for local governments to use their own tools to accomplish the original purposes of the Highway Beautification Act.

POLICY GUIDE

POLICY 1. APA National and Chapters support local regulation of billboards in the context of and consistent with local comprehensive and land use plans.

POLICY 2. APA National and Chapters promote Federal legislation that restores to local governments the authority to require the removal of billboards and other signs through amortization and other means consistent with the law and constitution of the particular state.

POLICY 3. APA National and Chapters support the authority of local governments to require nonconforming signs along Federal highways to comply with size and height requirements without cash payments.

POLICY 4. APA Chapters promote the adoption where necessary of state legislation that expressly authorizes local governments to offer amortization as compensation for a requirement to remove nonconforming billboards and other signs within the jurisdiction of the local government.

POLICY 5. APA Chapters promote the adoption of state legislation and local ordinances halting the construction of new billboards until the Federal government either appropriates sufficient funds to remove nonconforming billboards or restores the authority of local governments to remove billboards through amortization without cash payments.

POLICY 6. APA National and Chapters promote adoption of logo signs, providing service information with establishment or franchise logos and names, for exits on rural interstate, U.S. and state highways, when use of such logo signs is tied to limitations on the number, height and size of billboards in the same area.

POLICY 7. APA National and Chapters support continuation and strengthening of Federal and state legislation that allows control by local governments over the placement of new billboards.

POLICY 8. APA National and Chapters support increase of the setback exemption in the Highway Beautification Act and related provisions of ISTEA to one mile or such other distance as may be adequate to ensure that billboard companies cannot subvert the intent of the setbacks by simply installing larger signs outside the setbacks.

POLICY 9. APA National and Chapters support implementation and enforcement of restrictions on vegetation removal or trimming for the purpose of increasing the visibility of a billboard.

POLICY 10. APA National and Chapters support enabling legislation to levy user fees or taxes on billboards, which reflect the private benefit accruing to owners of billboards from the public investment in public roads, with the recommendation that such revenues be used to support highway beautification efforts.

EXHIBIT 3

August 21, 2001

Mr. Bill Klein
Mr. Stuart Meck
American Planning Association
122 S. Michigan Avenue, #1600
Chicago, Illinois 60603

Re: Growing Smart Model Code

Dear Mr. Klein and Mr. Meck:

Our four national organizations represent over 2 million members of the land use regulated community. We are a major portion of the companies and workers that keep the American economy going. We certainly understand the economic reality of regulation because we live with it every day. While we appreciate the efforts made by the American Planning Association (APA) with regard to the *Growing Smart Legislative Guidebook*, we have major reservations about the impending result of this effort. To attain smart growth, there must be smart process.

The undersigned organizations are deeply distressed about the manner the Directorate has handled the APA drafting/comment period. Over the last few years, we have monitored the progress of the *Growing Smart Legislative Guidebook* as the Directorate read, discussed, debated, and then decided countless land use issues for a model code; a Directorate led by APA and composed of governmental officials, public planners, and one representative each from the environmental and development communities. Much of what was decided we liked; much we disliked. However, we did not intervene. We abided by the APA process and accorded it respect. Then, at the eleventh hour, a faction that had had representatives on the Directorate was permitted to intervene in the proceedings and demand that issues already decided be reopened

and changed to their favor. Never mind that this environmental community already had a seat at the table. Never mind that the "built community" had only one seat out of a dozen, though very ably represented by Mr. Paul Barru of Colorado. To allow an organization that had representatives at the table through this long and thoughtful process, to intervene and reopen issues that have already been fully discussed and debated, undermines the progress APA had made in gathering consensus from all sides. Suddenly, due to this faction's intervention, changes are being made in mid-July covering many hundreds of pages, and comment is due hurriedly by mid-August

From what we can discern, a "model" land use legislative document that presented some balance – through strong language for comprehensive and detailed planning, many powerful regulatory tools, recognition of the need for certainty in the complicated land use process, and awareness that affordable housing, economic development, environmental protection, and property rights are all important values – is now greatly unbalanced. Two examples of this imbalance, include; (1) what is already a long, complex and expensive process is now made even more so because project "finality" is much more illusory and difficult to achieve (except where finality results in the death of a project); and (2) reading the proposed legislative document as a whole, it allows almost anyone to raise anything at any time in the regulatory or judicial process and undo what should be an orderly, considered, and democratic process.

In the name of even more environmental protection, controls for planning, zoning, and land use, which must meet the local police power standard requiring protection of the public health, safety or general welfare and comply with state and federal environmental controls, can be manipulated or misused by the inevitable not-in-my-back-yard (NIMBY) forces to stop needed uses for the total community. To take just one example with enormous significance, protection of the environment, which is vaguely defined as natural, open, historic or scenic areas,

is now raised at times by the model legislation to the same level as protection of public health, safety or general welfare. What about a protective right to jobs, to housing, to mobility -- or to the use of one's property? Is it not just as important to assess the impacts of a proposed development moratorium on those values?

If the APA model land use code is going to recommend altering the very police power formula that underlies all regulation and be considered balanced, it cannot stop with the environment. It must also place on an equal footing impacts on jobs, housing, property, and mobility. It seems truly ironic to imply that the current land use processes don't consider environmental factors. By definition, land use affects the environment. A model land use code must have fair process and equal substantive standards at all times if it is to work. And, even if the police power formula itself is not ultimately re-worked, the constant and express insertion of environmentalism into the code's land use processes and standards without an equivalent insertion of other values such as economic development and housing, means a model code that is unbalanced and, thus, unworkable.

We are also concerned about the lack of alternatives provided for in the model code. Each jurisdiction is unique. A range of alternatives should be presented so that each jurisdiction may choose the options best suited to their community. Each option should be presented in a neutral light so as not to recommend or imply a preferred approach. The most valuable legislative tool is a model code that offers a range of alternatives that the state and local legislators can consider.

Given these threshold observations on the draft model land use code's processes and standards, the following are some specific objections based on APA's July 9 memorandum and revamped June drafts as well as deep concerns we have held for some time. Also given the last minute nature of the changes to the draft code without any ability to compare this version with

the prior "completed" draft, we reserve the right to comment on other issues we may subsequently discover in our review:

1. **Adoption and Amendment of Land Development Regulations – Section 8-103**

We strongly oppose zoning by referendum. It is a destabilizing practice in the minority of places that allow it. Ill-informed emotion can easily override a thoughtful and deliberative planning and zoning process and everyone who relies on it. It is a classic tactic of exclusionary zoning proponents and, as such, should be condemned, not authorized, by any model code.

2. **Consistency of Land Development Regulations with Local Comprehensive Plan – Section 8-104**

Making void or voidable those land use actions or laws deemed inconsistent with a comprehensive plan is an idea that may sound good as a goal to strive for but, in practice, would cause uncertainty and havoc. A land use action that complied with all laws should not be subject to interpretive attack under the comprehensive plan. The predictability that law is supposed to give a community would instead be supplanted by chronic uncertainty, making financing of needed improvements much more difficult to attain and undermining the regulatory review process on which the community relies.

3. **General Review of Land Development Regulations – Section 8-107**

Reversing the presumption of reasonableness for land use laws not reviewed every five years by the locality puts in serious jeopardy all those projects proceeding through the development process, subjecting them to the same dangers and collateral attacks as referenced in Section 8-104 above. Citizens using governmental processes should not be punished for the inability of government to carry out its ministerial functions. To address this concern, alternative sanctions and incentives for the localities to meet these deadlines need to be provided.

4. **Site Plan Review – Section 8-302**

Subsection (5)(i), in referring to what an ordinance must contain, refers to standards covering preservation of natural resources existing on the site. Per Section 8-303(2)(c), the qualifier "critical and sensitive" needs to be inserted before "natural resources" or no new development could be built, only redeveloped.

5. **Uniform Development Standards – Section 8-401**

For the reasons stated above in points 2 and 3 concerning instability in the development process, we oppose the denial of a "presumption of reasonableness" if a state agency fails to review its development standards every five years.

6. **Vested Right to Develop – Section 8-501**

We strongly oppose the new "significant and visible construction" vested rights rule. This is so late in the "process" as to be no rule of protection at all because it is based on the out-dated common law rule that, in simpler regulatory times, a person could get permission to build relatively quickly, and then construction would commence. That is not today's world, as evidenced by the very "Growing Smart" code being created here. This code has thousands of pages of procedural and substantive requirements, hearings, administrative exhaustion rules, and more, all with the purpose or effect of making it exceedingly difficult to secure approval of any proposed development in a reasonable and market-sensitive period of time. One of the precious few protections accorded property owners in all these pages is a vested rights rule, but it must be sensible. After going through a long, complex, and exceedingly costly review process for a project proposal, it's extremely unrealistic to not provide finality until the process is substantially over and "significant, visible construction" is underway. It is especially disconcerting that while the project applicant must act in "good faith" to assert a vested right, no such concomitant "motive" requirement applies to other individuals or groups who may seek to monopolize the

land use process. The actions, not the motives, of all parties should be the relevant indications of good faith.

7. **Development Impact Fees – Section 8-602**

We object to the change in the Commentary, which attempts to undercut the rule of proportionality for impact fees. A statement has now been inserted saying, "[t]hough the U.S. Supreme Court has not yet applied the Dolan test [of essential nexus and rough proportionality] to an impact fee case . . ., [Dolan is still important]." But the Supreme Court did, and so have numerous lower courts, state and federal, none of which is cited among the other cases in the Commentary.

In Ehrlich v. Culver City, 512 U.S. 1231 (1994), the Supreme Court vacated a California Court of Appeals judgment upholding an impact fee imposed on a project. The lower court had found Nollan, Dolan's 1987 predecessor case, inapplicable to fees (money exactions). The Supreme Court, after vacating the state court judgment, then remanded the case "for further consideration in light of Dolan," decided earlier in 1994. On remand, the California Supreme Court held that Dolan is applicable to fees attached as conditions to a project. 911 P.2d 429 (Cal. 1996).

8. **Moratoria – Section 8-604**

We strongly oppose the broadening of a moratorium's purpose. A development moratorium is only defensible from a legal and policy standpoint if it is enacted to protect "public health or safety" and the government acts in good faith to cure the public facility emergency as quickly as possible. This is the core principle of many American court decisions addressing moratoria. By its very nature, a moratorium as generally used in the United States is an admission of public facility failure; it is essentially an "outside the process" procedure, one that is susceptible to great abuse by government and, thus, must be carefully circumscribed.

Most recently, Pennsylvania courts have overruled temporary development moratorium. In *Naylor v. Helman Township* (773 A.2d 770, June 20, 2001), owners of undeveloped real estate brought action against the township, seeking to invalidate an ordinance imposing a one-year moratorium on new subdivision and certain land development while a township revised its comprehensive plan, zoning, subdivision, and land development ordinances. The state Supreme Court reversed the lower court summary judgment ruling for the township, holding that the local government had stretched its zoning powers too far. In *Shaner v. Perry Township* (2001 WL 476561, May 8, 2001), where the township filed an equity action to force landowners and tenants to pave two lots, and denied occupancy permits for other prospective tenants, the state's Commonwealth Court ruled that the township engaged in de facto taking, laying the groundwork for a developer to collect compensation for lost development opportunities because of a temporary moratorium. And, the U.S. Supreme Court has agreed to hear a key moratoria case next term. The draft legislation unfortunately makes moratoria just another tool in the land use toolbox. It can now be imposed for "environmental" reasons, to stop everything while a comprehensive plan is prepared or while regulations are developed, or for some other compelling need. Moratoria can even be imposed on "smart growth areas" and last for 1.5 years, a long time for land to be rendered useless. In addition, Section 8-604 permits states and localities to impose "temporary" (however long that is) moratoria or policies on state permits or local rezoning. In short, both the rationale and duration of moratoria are so expanded by Section 8-604 as to raise major issues of abuse, unfairness, and takings.

9. Regulation of Critical and Sensitive Areas and Natural Hazard Areas – Section 9-101

Critical areas ordinances at the local level should be optional, not mandatory. This is a major expansion of local authority; true critical areas are generally regulated at the state level. Especially objectionable is the purposes clause: among the law's five purposes are to "conserve the natural resources of the community; prevent contamination of the natural environment." Neither "natural resources" nor "natural environment" is defined or qualified as those that are "critical and sensitive," as the heading would imply. These terms are both vague and overbroad, allowing for easy denial or highly restrictive approval of well planned, needed projects that meet all requirements. Equally objectionable is the wide-open definition of "critical and sensitive areas," which "means lands and/or water bodies that provide protection to or habitat for natural resources, or ..." again, neither "critical" nor "sensitive" is used to define or qualify "natural resources."

In other words, despite the heading reference to "critical and sensitive," this phrase is not used to define or limit "natural resources" and "natural environment." Because virtually every land use proposal (including those that comply with the comprehensive plan, zoning ordinance, subdivision ordinance, state and federal environmental laws, and other laws) affects "natural resources" or the "natural environment," this ordinance authorizes objections for just about everything. Thus, in the highly charged atmosphere of project hearings, the environmental consideration, whether really valid or not, can be easily used to trump other public goals (housing, economic development, transportation needs) that do not have the benefit of ordinances that address these areas.

10. Historic Districts and Landmarks: Design Review – Section 9-301

We strongly object to the change made by APA to now bring under historic review the interiors of structures. Virtually nowhere in the United States is this allowed, and for good reason.

We also object to the change made in subsection (8) (previously subsection (9)). Whereas the language had been clear that a historic review board could not deny a use permitted as of right by the zoning ordinance, language has been added at the eleventh hour that development can be denied, even development necessary for the permitted use. What seemed to have been protected is now taken away.

We urge that two important property owner protections, typical of historic ordinances, be added to the model ordinance. First, "Nothing in this Section shall deny reasonable, economic use of a person's property nor cause undue hardship to a property owner." Because of the broad regulatory power exercised by historic review boards and the often intrusive subjective judgments made by those boards as applied to private property, such boards need clear guidelines in their enabling law of their constitutional and equity limits.

And second, language should be added that an owner has the right to appeal an adverse decision to the Board of Appeals, and from there to court. When an historic review board goes too far, an owner must have a right to administrative review by the appeals board, and thereafter to a court.

11. Mitigation – Section 9-403

Owners should not be required, in each instance, to "create equivalent areas elsewhere." They should be allowed to pay a fee-in-lieu of recreating a resource, so that government or another private party can use the money for resource creation in other parts of the community.

In subsection (6), we again object, for the reasons stated above in points 2, 3 and 5, to the denial of a "presumption of reasonableness" to state standards that are not reviewed every five years.

Mitigation standards should also have the direct involvement of economic development agencies, not just environmental and planning agencies. Serious consideration needs to be given to economic and market-related conditions when drafting the mitigation standards.

12. **Land Use Incentives – Section 9-501**

We object to the requirement in subsection 5 that an incentives ordinance can only be adopted if the local comprehensive plan has a community design element and an amenities-justifying-density bonuses element. This is totally unnecessary and counterproductive. Amenity incentives require case-by-case, project specific review flexibility based on ordinance criteria. An incentives ordinance should not be tied inflexibly to the broad-ranging comprehensive plan as a prerequisite.

We also oppose the requirement in subsection 6 that an applicant must enter into a "development agreement" with the locality. Why does the APA want to make this process so complicated and expensive? Plus, for the overwhelming majority of states with no development agreement statutes, incentive zoning would not be allowed. As is so often done today, the incentive/amenity quid pro quo can simply be made a part of the conditions of approval of the development plan and enforced as such.

It should also be provided that in any incentives ordinance, the developer can provide the public amenity off-site if approved by the locality.

13. **Definitions – Section 10-101**

We are unclear about the difference between "adversely affected" and "aggrieved." Normally, "aggrieved" means showing specific concrete injury or harm, yet that is the definition for "adversely affected," which is confusing. More important, we strongly appose a "prejudice" standard for standing because it allows almost anyone to file suit against an approved project merely because the don't like it, regardless of any concrete, individualized harm.

If judicial review is limited to land use decisions, and land use decisions are defined in part as development permit application decisions, then development permit is too narrowly defined since it gives a list of typical actions covered. For example, it doesn't expressly include preliminary plan decisions or historic review decisions, which should be on any such list.

14. **Mediated Agreement – Section 10-504**

This "escape valve" procedure is too complex and cumbersome to be of any real use in most cases, especially in the small property type of cases. In particular, requiring both a development agreement and legislative approval is exceedingly burdensome and unnecessary. It should be one or the other. The local land use regulatory agency is fully authorized and capable to review cases of hardship and make appropriate findings and conclusions based on the facts, law and comprehensive plan. If a party is dissatisfied, they can then appeal to the Board of Appeals.

15. Judicial Review – Section 10-603

In the Commentary, in discussing the need for finality on a land use application before going to court, it states that the "federal rules require two applications, but one application should be sufficient" for the purposes of this code. The "two applications" statement is incorrect and should simply be deleted. First, the so-called "federal rule" is actually a reference to a footnote in MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 353, n.9 (1986), in which the Supreme Court observed that, in a takings case, where an owner makes an "exceedingly grandiose" proposal, a less intensive use may be approved, which would negate a takings challenge. The Court was clearly dealing only with constitutional takings claims and never required a mechanistic "two applications" for a case to ripen. Second, the Court strongly reaffirmed these points recently in Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2458-59 (2001), as well as Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997).

16. Exhaustion of Remedies – Section 10-604

We strongly oppose the requirement that after a local or state agency has (1) rendered an adverse decision, an applicant cannot go to court to protect its rights without (2) going to the appeals board, (3) seeking some conditional use, and (4) seeking a variance. This, four-level process is unnecessary and unrealistic. Indeed, numbers (3) and (4) are not remedies for a denied application. No developer should be required to undertake another type of project when a desired permitted use is denied. No one should be required to seek a variance where a desired permitted use is denied. Besides, doesn't this model code outlaw "use variances"? To make an applicant go through a time-consuming, expensive process and seek approval of projects or uses it has no interest in pursuing before having his or her day in court makes an already burdensome process even more so. This proposed process stands in strong contrast to the rationale articulated in Suitum and Palazzolo.

17. **Standing and Intervention – Section 10-607**

We strongly oppose allowing any individual who participated at a hearing to have standing to sue or the right to intervene in a lawsuit without having to show "aggrievement" (special injury) (subsection 4). The standard throughout the United States is that special injury must be shown for a person to be "aggrieved" enough to have legal standing. To allow anything less means that a locality's decision can be taken to court at any time by almost anyone and the locality's coffers and all parties in the matter would be involved in expensive and quite probably frivolous litigation.

18. **Review and Supplementation of Record – Section 10-613**

We strongly oppose allowing a court to supplement the record of the locality's challenged decision (subsection 1(d)). The general rule in the United States is that a court's review is limited to seeing if the locality's decision is based rationally on the record before it. To permit courts to "supplement" the record opens the door to abuse and judicial second-guessing. Under this procedure, the locality will no longer be the final decision-maker based on the facts and plans and policies before it; it will be the courts and those who decide strategically to sue later and bring in "new evidence" during the lawsuit. The courts across the nation have repeatedly opined that they are not planning and zoning boards and do not have the requisite skills to do so. Courts are to review administrative and legislative actions for procedural violations, bias, and arbitrary actions; they are not equipped to know the parameters of local market conditions and planning issues. Indeed, taking the objectionable provisions of Sections 10-604 (Exhaustion of Remedies), 10-607 (Standing) and 10-613 (Supplementation of Record) together, there will clearly be less certainty and greater instability in the land use process. If the goal of the APA is to endorse high hurdles to economic development, then this process should be

adopted. If, however, the goal of the APA is to have a more balanced planning process, then this proposal is greatly off the mark.

For all of the above reasons, as representatives of the regulated community and private landowners with a deep frustration over the recent "Growing Smart" turn of events at the eleventh hour, we ask that this letter be provided to each of the members of the Directorate prior to their September meeting in Chicago, IL.

Thank you.

Sincerely,

National Association of Industrial and
Office Properties

National Multi Housing Council

Self Storage Association

T. Peter Pruett

American Road & Transportation
Builders Association

cc: David Engel, HUD
Jim Hoben, HUD
Edwin Stromberg, HUD

Enclosure

EXHIBIT 4

U. S. SMALL BUSINESS ADMINISTRATION
NEVADA DISTRICT OFFICE
300 LAS VEGAS BLVD SOUTH , SUITE 1100
LAS VEGAS NV 89101-2940
702-388-6611 • 702-388-6469 (FAX) • 702-388-6631 (TDD)

February 26, 2002

Mayor Oscar Goodman
City of Las Vegas, Nevada
400 East Stewart Avenue
Las Vegas, Nevada 89101

Dear Mayor Goodman:

As the Nevada District Director for the U. S. Small Business Administration (SBA), I would like to express our deep concern about the changes to the Las Vegas sign code that have been recently proposed by city staff and consultants. We understand that the City Planning Commission had a thorough public hearing on these proposals at their February 21, 2002 meeting and we urge you and your fellow city council members to duly consider the results of those deliberations. Furthermore, we ask that you carefully consider this matter and the potential impact it may have on small businesses, the lending community and the local economy.

As a disinterested advocate for small businesses, we are concerned about these proposals that have the net effect to: (1) reduce the height or visibility of commercial freestanding signs by 40% and, (2) reduce the amount of sign area allowed on commercial buildings by 25%, and (3) require the future removal of signs not conforming to this new code within 25 years of their date of construction/erection or by 2017, whichever is earliest. Please note that the affected signs were legally constructed in reliance upon the laws then in effect and that significant investment and maintenance costs have been incurred in their creation, as well.

The SBA recognizes the critical nature of signage for small businesses to such an extent that signage is a key component of our agency website on starting a small business (www.sba.gov/starting/signage). Our website recognizes that sales volumes are tied to signage. Considering that many small businesses operate on a very small profit margin, we are concerned with any changes to the sign code that could place small businesses in a competitive disadvantage and that could ultimately lead to business failure.

We are also concerned from the standpoint of commercial lending support for small businesses. Lenders routinely assess the risk of business failure when loaning money for business start-ups and expansion. If the sign code were to be changed in a manner that increased the risk of business failure, or resulted in the loss of an asset for which funding has been advanced (i.e. a sign), the impact on lending practices within the community for small businesses could be profound.

In closing, we trust that you and your colleagues on the City Council will endeavor to consider the full ramifications of the concerns raised by the business community and will act to protect the beneficial environment for small business that we now enjoy.

Sincerely,

John E. Scott
SBA District Director for Nevada
Las Vegas, Nevada
(702) 388-6019

EXHIBIT 5

Amicus Curiae Committee
The APA Amicus Curiae Committee is one of the more visible parts of APA. It files "friend-of-the-court" briefs in state and federal courts in cases of importance to the planning profession and the public interest. Since April 2000, the Amicus Curiae Committee has filed 13 briefs on issues related to affordable housing, annexation and provision of services, sign regulations, and inverse condemnation ("takings"), among others. Four of these briefs were filed in the United States Supreme Court.

The committee has been a standing committee of APA's Board of Directors since 1985 and includes eight distinguished attorneys and planners from around the country. The Chair is Patricia E. Salkin, Director of the Government Law Center at Albany Law School.

The other members include:
Rodney L. Cobb, Esq. (Scottsdale, Arizona)
Vivian Kahn, AICP (Oakland, California)
Richard A. Lehmann, AICP, Esq. (Madison, Wisconsin)
Daniel R. Mandelker, AICP, Esq. (St. Louis, Missouri)
Deborah Rosenthal, AICP, Esq. (Irvine, California)
Nancy Ellen Stroud, Esq. (Boca Raton, Florida)
Charles R. Wolfe, Esq. (Seattle, Washington)

In 1990, the APA Board of Directors adopted formal procedures for the committee that include involving APA chapters in the deliberations. To learn more about the activities of the Amicus Curiae Committee, please contact Lora Lucero, AICP, Esq.

Amicus Curiae Briefs

Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency

Toll Brothers v. Township of West Windsor

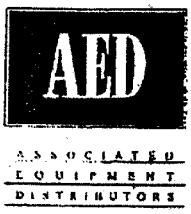
City of Los Angeles v. Alameda Books

Lorillard Tobacco Co. v. Reilly

City of Monterey v. Del Monte Dunes at Monterey, Ltd.

Palazzolo v. State of Rhode Island

EXHIBIT 6



Reply To:
Anthony J. Obadal
AED Washington Counsel
Obadal & MacLeod, P.C.
121 North Henry Street
Alexandria, VA 22314-2903
Phone: (703) 739-9513
Facsimile: (703) 739-9488
E-Mail: aeddc@aednet.org

26 November 2001

The Honorable Mel Martinez
Department of Housing and Urban Development
451 7th Street, S.W.
Washington, D.C. 20410

VIA FACSIMILE: (202) 619-8365

Dear Secretary Martinez:

This letter is written on behalf of the Associated Equipment Distributors to express our members' concerns about the *Legislative Guidebook*[1] developed by the American Planning Association with support from the Department of Housing and Urban Development that is currently under review by your office.

It is our position that the process by which the *Guidebook* was developed did not provide sufficient opportunity for comment by those with a direct interest in the outcome of the work and differing views from those contained in the final product. Additionally, the concepts and methodologies contained in the *Guidebook* are flawed and would lead state and local governments to adopt policies that severely restrict economic growth, undermine personal mobility, and limit individual choices about how and where to work, travel, and live.

We therefore urge you to exercise your authority under the HUD/APA contract to reject and disapprove the proposed *Guidebook* and ask that you work with other members of the general public to develop a more balanced and less centralized approach to community growth issues.

Discussion

The Associated Equipment Distributors represents companies engaged in the sale, rental, leasing, and servicing of construction, agricultural, mining, and forestry equipment. The average AED member has 50 employees and $5 million in annual sales. While most of our member businesses are family-owned, the association's membership also includes several large, publicly-traded companies. We also count as associate members all of the major equipment manufacturing companies and the finance companies that provide services to our industry.

---

[1] American Planning Association, *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change*, American Planning Association (2001) <http://www.planning.org/pinginfo/GROWSMAR/guidebk.html>.

Over the last several years, AED has become increasingly concerned about efforts by the radical environmental movement to undermine the authority of local governmental units over growth and planning issues and manipulate the federal government to promote the anti-growth, anti-road "Smart Growth" agenda. While we hesitate to generalize, this philosophy essentially opposes the dispersal of our population into suburban and rural areas and seeks to use government compulsion to confine development within high-density growth boundaries

The previous administration initiated numerous programs to promote this sort of so-called "Smart Growth." Perhaps the most brazen of these was the Transportation Partners Program, through which the Environmental Protection Agency provided direct financial support from the public coffers to environmental groups working to block road projects at the local level. AED was instrumental in bringing the Transportation Partners Program to the attention of lawmakers on Capitol Hill and in the program's eventual termination.

Despite the outcome of the 2000 presidential election, there are still a number of bureaucrats in federal agencies and departments who share the radical environmentalist view that new road construction and any new development outside specified urban growth rings are inherently evil. We are concerned that this philosophy underlies the *Legislative Guidebook*.

Planning is and should remain a state and local issue, not a federal one. The APA legislative package subverts the principles of local control and freedom of choice to which Americans in general and the Bush administration in particular are committed. Moreover, the "Smart Growth" policies contemplated by the Growing Smarter program would actually reduce urban livability by increasing congestion, pollution, housing, and other costs. Its programs would defeat quality growth and development.

The Growing Smarter legislative package was developed by the American Planning Association as a part of its continuing commitment to the idea that Americans would be better off if their lives were coordinated for them by centralized planners employed by federal, state, and regional governments. This is a dubious proposition at best and a view that is certainly not shared by our members.

We are concerned in particular about the fact that the *Guidebook* fails to address alternative viewpoints or even to recognize that they exist. The *Guidebook* purports to take a balanced approach to growth and states that "There is no single 'one-size-fits-all' model for planning statutes."[2] However, the book fails to consider whether restrictive state planning statutes are in and of themselves good or necessary. Thus, the *Guidebook* is the planning equivalent of a statement that "all Americans should be required to wear red shirts on Tuesdays, but we recognize that not all red shirts will fit all Americans."

Douglas Porter, of the Urban Land Institute, put it most bluntly when he noted there is a "gap between the daily mode of living desired by most Americans and the mode that most city planners believe is most appropriate." Most Americans "generally want a house on a large lot" and to drive

---

[2] Guidebook, *supra*, Introduction <http://www.planning.org/plnginfo/GROWSMAR/images/intro.pdf>.

"cars to work, shopping, recreation, and every other aspect of their daily lives," says Porter. But planners disparagingly refer to such lifestyles as "sprawl" and want to discourage them.[3]

The difficulty for planners, Porter notes, is that local governments tend to give the voters what they want, including low-density zoning and highways. The American Planning Association, while not as explicit, is apparently of the view that the solution is to create state planning laws and regional governments that can impose planners' ideas on people without being easily subjected to voter approval.

The Growing Smarter legislation is based on this philosophy. Under this legislation, local governments would be required to write plans that follow state goals[4] and regional plans[5] even if the residents of the local areas do not agree with those goals.

The American Planning Association argues that certain issues are regional or statewide in scope and cannot be dealt with locally. But state and regional land uses and transportation are simply too complicated for ***anyone*** to understand and plan at the level of detail contemplated by the American Planning Association. Even if someone could comprehend all of the problems faced by a metropolitan area today, no one can predict the future. Yet the Growing Smarter model assumes that planners can predict the future. The model that your agency is considering recommending would create a "state futures commission" that would "prepare a state strategic futures plan."[6]

States and regions that have prepared such plans typically try to plan for 20, 30, or even 50 years into the future. Imagine writing a plan for 2002 twenty years ago, when no one had ever heard of the Internet; or 30 ago, when no one had ever heard of personal computers; or 50 years ago, when no one had ever heard of interstate freeways and today's commercial jet service was still a pipedream.

Any plans written 20 to 50 years ago for today would necessarily be wrong. However, the APA would have cities and states lock themselves into inefficient, and potentially disastrous, extreme-long-term policies and programs.

Since planners can neither predict the future nor deal with all of the details of a region or state, they rely on something else to guide their planning. They rely on fads. During the 1950s and 1960s, planning fads included urban renewal and public housing projects. These often had disastrous consequences for American cities. Today, the fad is Smart Growth and urban growth rings, which require populations to live in high-density areas if they wish to receive basic government services such as sewer and water lines or education funding. This fad too will have disastrous consequences for Americans.

---

3 Douglas Porter, *Regional Governance of Metropolitan Form: The Missing Link in Relating Land Use and Transportation*, Transportation, Urban Form, and the Environment, 63-80 (Transportation Research Board, 1991).

4 Guidebook, *supra*, Chapter 4 <http://www.planning.org/pinginfo/GROWSMAR/images/chap4.pdf>.

5 Guidebook, *supra*, Chapter 6 <http://www.planning.org/pinginfo/GROWSMAR/images/chap6.pdf>.

6 Guidebook, supra, Chapter 4, Section 4-201(7), <http://www.planning.org/pinginfo/GROWSMAR/images/chap4.pdf>.

Portland, Oregon is often cited as a model Smart Growth community. The Portland metropolitan area includes three counties, all of which wrote land-use plans in the late 1970s in response to statewide goals, just as is contemplated by the Growing Smarter legislation. Clackamas County ended up with a surplus of residential areas and a shortage of industrial areas. Washington County has adequate industrial areas but a shortage of residential land.

State and regional planning agencies and regulations have prevented Washington County from adding residential land and Clackamas County from adding industrial land. Now the region is locating hundreds of thousands of new residents in Clackamas County, from which many face lengthy commutes over an inadequate and congested transportation network to new jobs in Washington County.

Portland illustrates many other unfortunate side effects of regional planning:

- Increased traffic congestion - Portland's Metro predicts a quadrupling of the amount of time Portlanders waste in traffic in the next twenty years.[7]

- Unaffordable housing - In just twelve years Portland has gone from being one of the nation's most affordable to one of the ten least affordable housing markets (as measured by the National Association of Home Builders' Housing Opportunity Index).

- Serious watershed problems - Portland planners were recently shocked to learn that their plans for compact development were incompatible with National Marine Fisheries Service guidelines for recovering endangered salmon.[8]

These problems are a direct result of the complexity of urban areas and the inability of planners to understand that complexity and predict future needs and concerns.

- Portland planners emphasized transit even though their own predictions show that at least 88 percent of all travel will be by automobile. The result is increased congestion.

- Portland planners emphasized urban-growth limits even when those limits led to a skyrocketing of land prices and unaffordable housing.

- Portland planners never considered the effects of their plans on salmon, much less on people.

Significant portions of the Growing Smarter legislation are specifically directed at transforming the lifestyles of unwilling Americans. For example, Section 7-302, "transit-oriented developments," is aimed at "reducing dependence on the automobile caused by dispersed, low-density development."

---

[7] Metro, 2000 Regional Transportation Plan, 3-18 (2001).

[8] *Fight Sprawl, Kill Salmon*, Willamette Week, Oct. 22, 2001. <http://www.wweek.com/flatfiles/News2107.html>.

This raises important technical questions. First, does auto driving and low-density development really create all of the problems that planners claim? Many experts disagree with planners' assertions that transit is better than driving. Writing in the Spring 2000 issue of *Access* magazine, University of California economist Mark DeLucchi estimates that total subsidies and social costs per passenger mile of the automobile are little more than a tenth of transit subsidies alone.

Other experts, including UCLA's real estate and planning professors Peter Gordon and Harry Richardson, argue that so-called "sprawl" actually reduces congestion and other environmental problems and allows Americans to achieve higher incomes at lower costs.[9]

A few planners and most Smart Growth advocates say that Americans need to drive less to protect air quality. Yet emission controls continue to reduce total automotive emissions despite increases in driving. Air pollution is as much a function of congestion and concentration as it is of miles driven. Since Growing Smarter plans for compact development lead to more congestion and concentration of toxic pollutants than are found in typical low-density suburbs, they make air pollution worse, not better. Such one-sided views should not be recommended by HUD; broader, more diverse viewpoints are needed.

The second major question is whether transit-oriented development and other Smart Growth ideas actually reduce the amount of driving Americans do. Portland's experience indicates that the answer is "no." Metro planners predict that even after building several new light-rail lines and dozens of transit-oriented developments per capita driving in Portland will increase.

This confirms data indicating that across more than 300 U.S. metropolitan areas there is little relationship between population density and per capita driving. According to the Federal Highway Administration's recently published Highway Statistics 2000, many high-density metro areas, including Los Angeles, Fort Lauderdale, and San Jose, have per capita driving levels well above average. Conversely, residents of many low-density metro areas, including Buffalo and Ithaca, New York, and Pueblo, Colorado drive less than average.

Beyond these technical questions is the more fundamental question of whether the federal government should play any role in state and local planning. The various states have adopted a wide variety of approaches to urban and regional planning, ranging from the highly centralized systems in Minnesota and the Pacific Northwest to the highly decentralized systems of Texas and the Southwestern states. By many measures, including traffic congestion, housing affordability, and watershed management, the decentralized systems have proven to be better.

If the Bush administration were to endorse any system, it should be a decentralized program that allows local control instead of centralized state or regional control. Quality Growth can be fostered through the development of models that put forward many different options. The federal government should allow states to continue to experiment with a full range of alternatives.

---

[9] Peter Gordon and Harry Richardson, *Congestion Trends in Metropolitan Areas*, Curbing Gridlock: Peak-Period Fees to Relieve Traffic Congestion, 2:1-31 (National Research Council, 1994).

A defining characteristic of the Bush administration is its commitment to the principles of the free market and independent entrepreneurship, and to the belief that healthy competition will ultimately result in greater efficiency, higher productivity, and the best innovations. Those concepts should be applied to community planning as much as to the economy. At a basic level, states, cities, and communities are competitors. Those that provide the highest quality of life, the least congested and most efficient transportation systems, and the best economic opportunities will ultimately attract the nation's best workers and companies and will prosper.

Governmental units at all levels therefore have an interest in experimenting with various growth options with the ultimate goal of finding a system or plan that works the best in that particular area. The federal government should no more mandate a system of planning for states and localities than it should mandate that businesses conduct research, manage their affairs, or market their products in a certain way.

The United States is the most productive nation in the world because Americans have the freedom to live, work, and move where and how they want. Highways and automobiles play an indispensable role in American mobility, moving us more than 80 percent of the miles we travel. Low-density suburbs have attracted half of all Americans as well as increasing numbers of employers.

Conclusions

The *Legislative Guidebook* currently under review by your office is flawed in two ways. First, the process by which it was developed failed to take into account the differing viewpoints about the growth issue and the document therefore mirrors only one, narrow perspective. Secondly, the ideas that were incorporated into the *Guidebook* reflect the faddish "Smart Growth" philosophy that threatens to restrict personal mobility, increase housing costs, and undermine the efficiency of our transportation systems.

For these reasons, we urge you to use your authority under the HUD/APA contract to reject the *Guidebook* and to work with us and other groups with an expressed interest in these issues to develop a more balanced and less centralized approach to the growth challenges facing our communities around the nation.

Thank you for your consideration of our comments.

Sincerely,

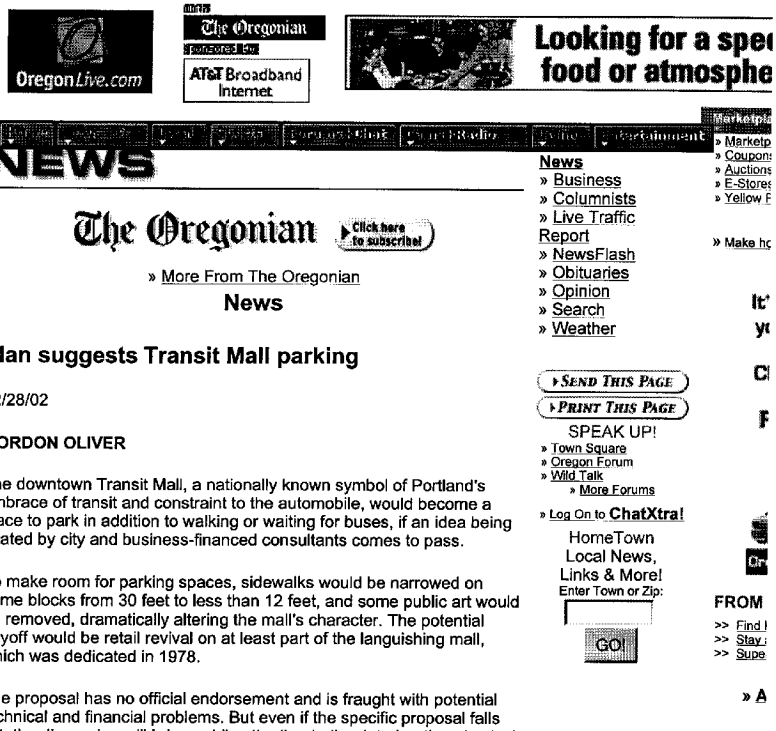
/signed/

Anthony J. Obadal[10]
Washington Counsel

---

[10] Christian A. Klein, AED associate Washington counsel, and Randal O'Toole, senior economist at the Thoreau Institute, assisted with the preparation of this letter.

EXHIBIT 7



OregonLive.com

The Oregonian

AT&T Broadband Internet

Looking for a spe
food or atmosphe

NEWS

The Oregonian Click here to subscribe!

» More From The Oregonian

News

Plan suggests Transit Mall parking

02/28/02

GORDON OLIVER

The downtown Transit Mall, a nationally known symbol of Portland's embrace of transit and constraint to the automobile, would become a place to park in addition to walking or waiting for buses, if an idea being floated by city and business-financed consultants comes to pass.

To make room for parking spaces, sidewalks would be narrowed on some blocks from 30 feet to less than 12 feet, and some public art would be removed, dramatically altering the mall's character. The potential payoff would be retail revival on at least part of the languishing mall, which was dedicated in 1978.

The proposal has no official endorsement and is fraught with potential technical and financial problems. But even if the specific proposal falls flat, the discussion will bring public attention to the deteriorating physical condition and weak business climate along the Fifth and Sixth avenues mall. The mall has been a topic of talk but no action among business and government leaders for almost a decade.

"It is dull in its current state, and portions of the retail are lifeless," said Sam Adams, chief of staff to Mayor Vera Katz, who said the mayor has not reviewed the consultant's draft recommendations.

The original mall on Fifth and Sixth avenues stretches from Madison to Burnside streets, with a later extension north of Burnside to Union Station. The streets have one lane for buses to pull to the curb, one lane for bus through-traffic and, on most blocks, one lane for automobile traffic. Sidewalks are 18 feet wide opposite bus stops, widening to 30 feet every fourth block, eliminating automobile through-traffic.

The consultants for a downtown retail steering committee suggest a reconstruction of the mall on Fifth and Sixth avenues, between Salmon

News
» Business
» Columnists
» Live Traffic Report
» NewsFlash
» Obituaries
» Opinion
» Search
» Weather

SEND THIS PAGE
PRINT THIS PAGE

SPEAK UP!
» Town Square
» Oregon Forum
» Wild Talk
» More Forums

» Log On to ChatXtra!
HomeTown Local News, Links & More!
Enter Town or Zip:
GO!

» Marketp
» Coupon
» Auctions
» E-Store
» Yellow F
» Make hc
It'
yc
C
F
FROM
>> Find
>> Stay
>> Supe
» A

and Washington streets. Curbside parking would be allowed on two blocks in either direction extending from Pioneer Courthouse and in some cases within the street right-of-way. The wider sidewalks would be narrowed to allow through-traffic between Yamhill and Taylor streets.

Portland architect George Crandall, the consultant who presented the proposal for parking on the mall, said it is important for parking to be available even if the spaces are usually full. "It's very difficult for businesses to be healthy," he said, "if there isn't some opportunity for parking on the streets they face."

The Portland Development Commission and the Association for Portland Progress launched the study in December to come up with ways to help strengthen and attract retail businesses. The changes to the Transit Mall are among many ideas in the draft recommendations that were presented to a committee, composed mainly of downtown retailers and property owners, on Tuesday.

The study, led by Economics Research Associates of San Francisco, is expected to produce final recommendations in March. Proposals adopted by the steering committee would go to the Portland Development Commission and the board of the Association for Portland Progress, and then on to the Portland City Council, said Franklin "Kim" Kimbrough, president of the Association for Portland Progress.

The steering committee discussions, which take place during breakfast meetings in the business association's downtown offices, are unusual both for their speed and scope. City and business leaders say they want to move quickly on a plan to shore up the downtown retail climate and eliminate uncertainty for business owners and potential new businesses.

Tim Greve of Carl Greve Jewelers, a steering committee member, said he is surprised by the speed of the study, but said he finds it refreshing in a city where public policy decisions can drag out for years.

"Knowing the way Portland works, there's no way in the world that aspects of the plan won't get subjected to public input," he said. "We will get things back to normal Portland time frames for policy.

"The fact remains that there are a lot of problems with the retail vitality of downtown," Greve added. "If something isn't done, it's not going to get cheaper and it isn't going to get any easier."

Another light-rail line Other changes on the mall remain under discussion. For instance, a committee of the Association for Portland Progress is pushing Metro for further study of running a north-south light-rail line on the mall. Chris Kopca, who heads that committee and is a member of the retail steering committee, cautioned against considering the future of the mall without considering future transit needs.

"We need to talk about how to accommodate transit rather than coming up with a design for the mall," said Kopca, who works on development projects for the Goodman family, which owns a number of downtown buildings and parking lots.

On the technical side, Portland consultant Roger Shiels noted the potential difficulty of building sidewalks within 12 feet of buildings, since some buildings have basements that extend to the original sidewalk width of 15 feet. "That's not to say it couldn't be done, but it certainly could be a very disruptive thing to do," said Shiels, who was a consultant to the city and Tri-Met for the mall's construction in the

Still, the idea of doing something to bring new life to the mall has been on many people's minds for years. The possibility of light-rail construction on a north-south rail line that was rejected by voters put improvement projects on hold, said Vic Rhodes, director of Portland's Office of Transportation.

"We know the mall is in terrible condition," Rhodes said. Now, he said, the city has no money for improvements.

The mall's problems go beyond broken bricks. The area has not attracted retailers, often rolling up the carpet at the end of the workday. Many blocks have uninviting storefronts or sitting areas that attract loiterers. Businesses on the mall have not taken advantage of the wide sidewalks, perhaps because of noise or their perception of inadequate visibility to automobiles.

The mall has a powerful place in Portland's civic image and remains important functionally to the regional transit system, said Portland historian Carl Abbott of Portland State University. "The transit mall is such an icon in Portland's success in turning downtown around."

While not opposed to changing the mall, Abbott said he is skeptical that adding a few parking spaces would create enough change to be worth the cost. But he said it is important that the idea get a full public airing outside the business-oriented steering committee.

"Any changes would have to be studied long and hard," he said, "and would have to go through the classic Portland process." You can reach Gordon Oliver at 503-221-8171 or by e-mail at gordonoliver@news.oregonian.com.

» Send This Page | » Print This Page

MORE NEWS
» Jury indicts Arthur Andersen
» Disappearances link two families, two similar girls
» Tangled airwaves a danger, FCC says
More Stories | 30-Day Archive

MORE FROM THE OREGONIAN
Latest News | The Oregonian Links & Archives

EXHIBIT 8

Congress of the United States

Washington, DC 20515
November 19, 2001

The Honorable Mel Martinez
Secretary
U.S. Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410

Dear Secretary Martinez:

We are writing to express our strong opposition to the 2002 edition of the *Legislative Guidebook*, a product of the Growing Smart project of the American Planning Association. Further, we respectfully request that you oppose the *Legislative Guidebook*, especially since the report was prepared under a U.S. Department of Housing and Urban Development (HUD) cooperative agreement.

As you know, HUD has been tasked in the coming weeks to approve the publication of the *Legislative Guidebook*, a comprehensive blueprint of model statutes and planning guidelines to govern land use planning at the state and local levels. After carefully reviewing the document it is quite clear that this proposal runs counter to the most basic principles we value.

Specifically, many provisions in the *Legislative Guidebook* would trample the rights of private property owners by seizing their land without the just compensation that our Constitution requires. Indeed, the Framers of the Constitution clearly recognized this right as they laid out the foundations of American Democracy, and it has been reinforced time and time again in the courts.

To complicate matters furthers, the *Legislative Guidebook* would authorize various land development regulations which would impose financial hardships on many small businesses. For instance, the report contains provisions which would impose moratoriums and, in some cases, strict guidelines on the small business community for the issuance of permits to display outdoor advertising signs.

While we recognize that the report is a research document which does not necessarily represent the policy of HUD, we are certain that this is an important issue that deserves your full consideration. Very simply, your willingness to oppose the *Legislative Guidebook*, as well as continue to consider all views demonstrates your commitment to private property owners, small business owners and economic development. Even further, it helps to ensure that this is a full, open and fair process.

Thank you for your attention to this matter. We look forward to your prompt response as you work toward a solution for this concern.

Sincerely,

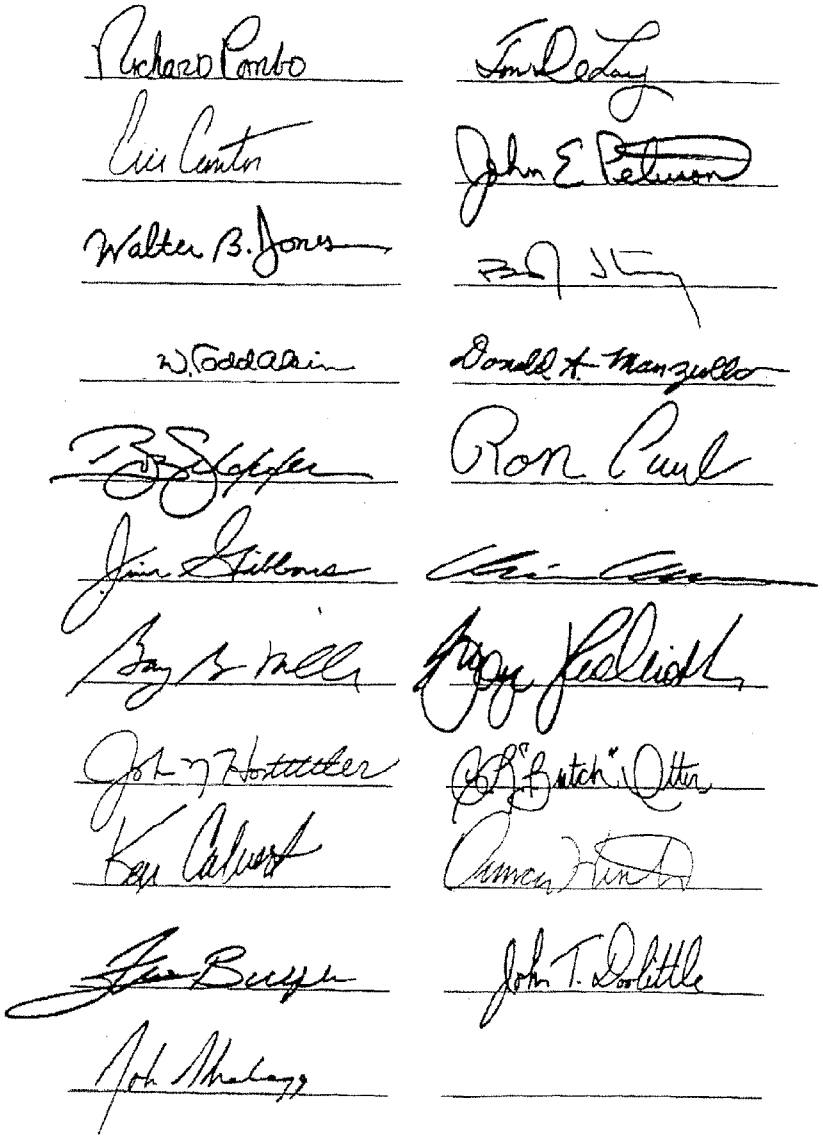


EXHIBIT 9

State of
Washington
House of
Representatives

November 28, 2001

The Honorable Mel Martinez
U.S. Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410

Dear Secretary Martinez:

The undersigned members of the Republican Caucus of the Washington State House of Representatives write you to express serious concerns regarding the American Planning Association (APA) Legislative Guidebook (Guidebook), and to urge you to exercise your authority under the HUD/APA contract to disapprove the Guidebook.

The State of Washington has had ten years of experience under a state-mandated "growth management" regime. The results of this experiment have been dramatic:

1) increased congestion in our urban areas,
2) increased housing costs in our urban areas,
3) decreased economic development in our rural areas,
4) an ever-increasing amount of regulation by both the state and local governments.

These regulations -- on both the state and local levels -- breed further regulations. A perfect example of this is "concurrency" requirements, currently contained in Washington State law with regards to transportation facilities and recommended in the Guidebook for most infrastructure. These prescriptions require local governments to deny development where local facilities do not meet some predetermined "level of service." However, it is precisely the "density" requirements embodied by these so-called "smartgrowth" policies that create the congestion in the first place. The answer by state and local governments? Further regulation, in an ever increasing cycle of control over individual's use of their property, without a hint of compensation provided to affected landowners.

The Puget Sound region in Washington has developed some of the worst congestion in the country over the past ten years, the time period coinciding with Washington's growth management scheme. At the same time, housing prices in the Puget Sound region have skyrocketed, in large part due to the limitations on supply that have accompanied growth management. Finally, economic development in Washington's rural areas has come to a virtual standstill, and as the agriculture-based economies of such rural areas have suffered over the past few years, local communities have not been able to turn to other industries for jobs because of the development restrictions contained in the state's "smartgrowth" statutes.

The Republican members of the Washington State House of Representatives do not believe that a

Republican administration could be party to encouraging these destructive policies to be adopted by other states and local governments. Yet this is precisely what H.U.D.'s acceptance of this Guidebook would accomplish.

It is not hard to fathom the APA's interest in pursuing this guidebook. The APA will expand its membership as the number of planners expands exponentially with the implementation of this "smartgrowth" scheme. Further, under these very restrictive proposed local and state laws, the power of those who make a living by "planning" the lives of citizens will also radically increase.

For the most part, these planners are unelected, as are the state bureaucrats who oversee these "smartgrowth" programs. Such programs, when instituted, therefore constitute a massive shift of responsibility and accountability from the people and their elected local officials to labyrinth planning departments and state agencies.

We in Washington have lived with this nightmare for ten years, and despite our best legislative efforts, democratic majorities in Washington's legislature or a democratic Governor have prevented reasonable reforms to Washington's Growth Management Act. However, we would urge you, Secretary Martinez, to avoid assisting big-government liberals and their planning association and radical environmentalist allies, from spreading this "smartgrowth" disease across the country. We urge you to reject the APA's Legislative Guidebook, and if the department is interested in addressing state and local planning methods, to begin an inclusive process in which all interested parties might participate to develop the administration's position on this issue.

Sincerely,

Republican Members of WA State House of Representatives

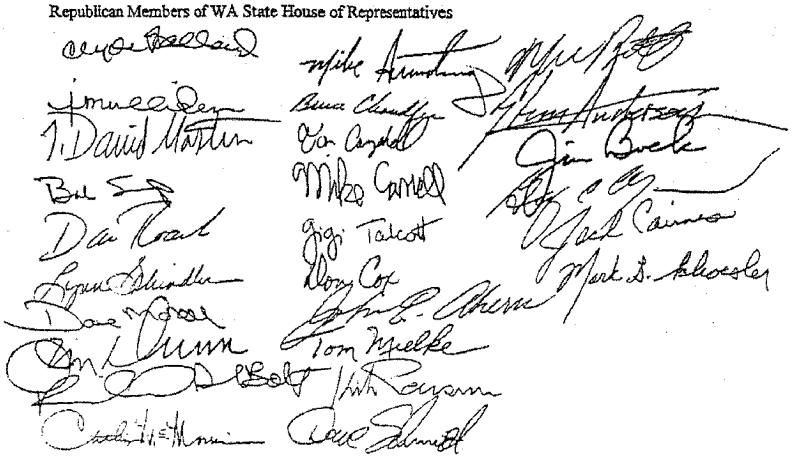


EXHIBIT 10

BELDEN RUSSONELLO & STEWART

RESEARCH AND COMMUNICATIONS

National Survey on Growth and Land Development
September 2000
for *Smart Growth America*

Interviewing conducted September 7-10, 2000
N = 1,007 adults 18 years old or older
Margin of sampling error is ± 3 percentage points
Data have been weighted by gender, age, region and race
Percents may add to 99% or 101% due to rounding
* indicates less than 1% , — indicates zero

---

1 Thinking about the area where you live, has traffic over the last three years gotten better, gotten worse, or stayed about the same?

GOTTEN BETTER	9%
GOTTEN WORSE	54
ABOUT THE SAME	37
DK/REFUSE	*

---

2 Do you agree more with those who say it is better to have land-use planning to guide the place and size of development in your county or area, or more with those who say that people and industry should be allowed to build wherever they want?

SUPPORT LAND-USE PLANNING	78%
ALLOW TO BUILD	17
DK/REFUSE	5

---

3 Now, thinking about your state, is there a need to do more or to do less to manage and plan for new growth and development in your state?

DO MORE	76%
DO LESS	13
DK/REFUSE	12

1320 19TH STREET, NW ✦ SUITE 700 ✦ WASHINGTON, DC 20036
T: 202-822-6090 ✦ F: 202-822-6094 ✦ E-MAIL: BRS@BRSPOLL.COM

Here are some proposals on development and land use policy in your state□For each one, please tell me if you strongly favor, somewhat favor, somewhat oppose or strongly oppose the proposal□[ROTATE Q4-12]

	Favor		Oppose		DK/
	Strng	Smwt	Smwt	Strng	ref
4□Increase coordinated efforts among towns to plan for growth□	46%	39	6	4	5
5□Have state government give funding priority to maintain services, such as schools and roads, in existing communities rather than to encourage new development in the countryside□	47%	34	8	6	5
6□Establish zones for green space, farming, and forests outside of existing cities and suburbs that would be off-limits to developers□	56%	27	8	6	3
7□Require that all new housing developments built in your state include at least 15% of housing for moderate and low-income families□	32%	34	17	13	4
8□Have government provide tax credits and low-interest loans for people to revitalize cities, suburbs and rural communities that are not doing so well economically□	41%	40	9	8	3
9□Have government use tax dollars to buy land for more parks and open space and to protect wildlife□	46%	31	10	11	3
10□Have your state government use more of its transportation budget for improvements in public transportation, such as trains, buses and light rail, even if this means less money to build new highways□	29%	31	21	15	5
11□Use part of the state transportation budget to create more sidewalks and stop signs in communities, to make it safer and easier for children to walk to school, even if this means less money to build new highways□	47%	30	12	7	3
12□Provide tax credits and low-interest loans for people to rehabilitate historic houses and revitalize neighborhoods in cities and older suburbs□	44%	35	11	7	3

13 Which one of the following proposals is the best long term solution to reducing traffic in your state: [ROTATE] Build new roads, Improve public transportation, such as trains, buses, and light rail, or Develop communities where people do not have to drive long distances to work or shop

BUILD NEW ROADS 21%
IMPRV PUBLIC TRANSPORT 47
DEVELOP COMMUNITIES 28
DK/REFUSE 5

14 The term Smart Growth refers to giving priority to improving services, such as schools, roads, affordable housing, and public transportation in existing communities, rather than encouraging new housing and commercial development, and new highways, in the countryside With this in mind, would you favor or oppose smart growth policies in your state?

FAVOR SMART GROWTH 78%
OPPOSE SMART GROWTH 16
DK/REFUSE 5

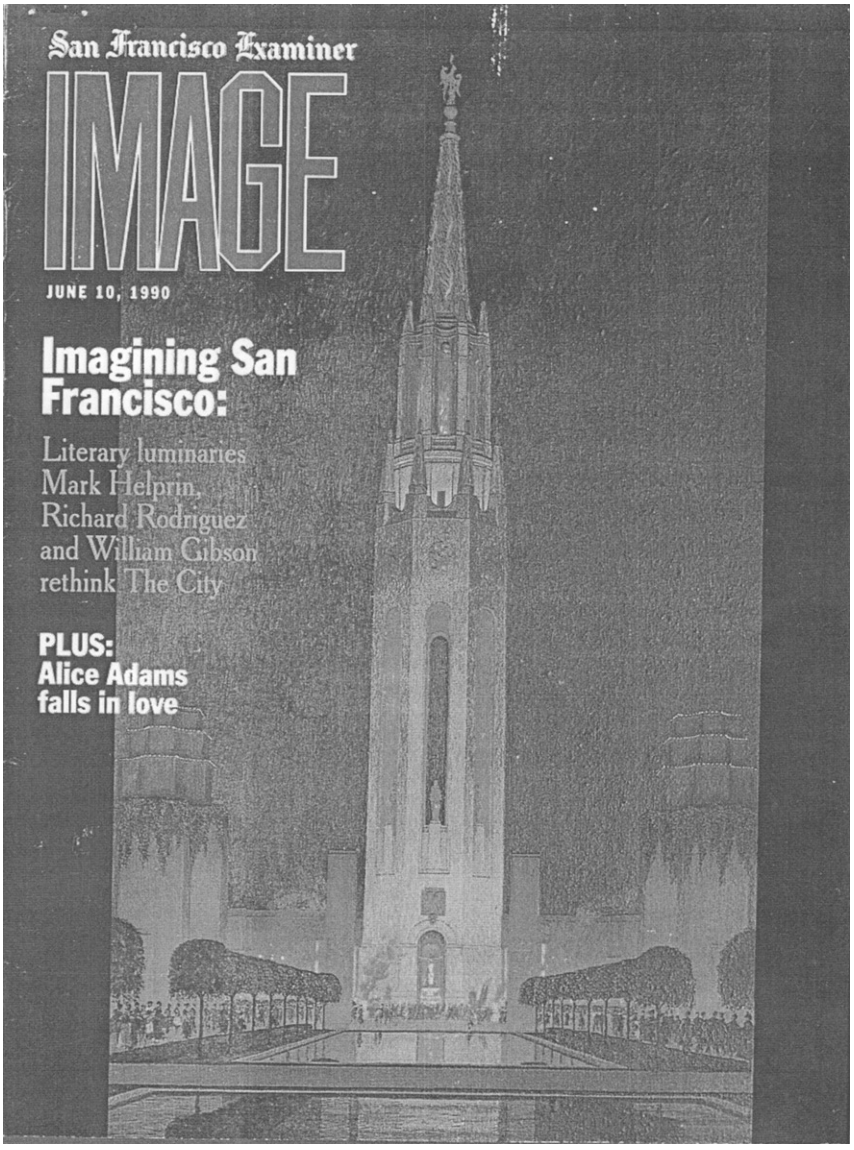
How much confidence do you have in each of the following to make the best decisions on land use issues affecting your area? Do you have a great deal, some, not very much, or very little confidence in ... [SCRAMBLE ORDER Q15-20]

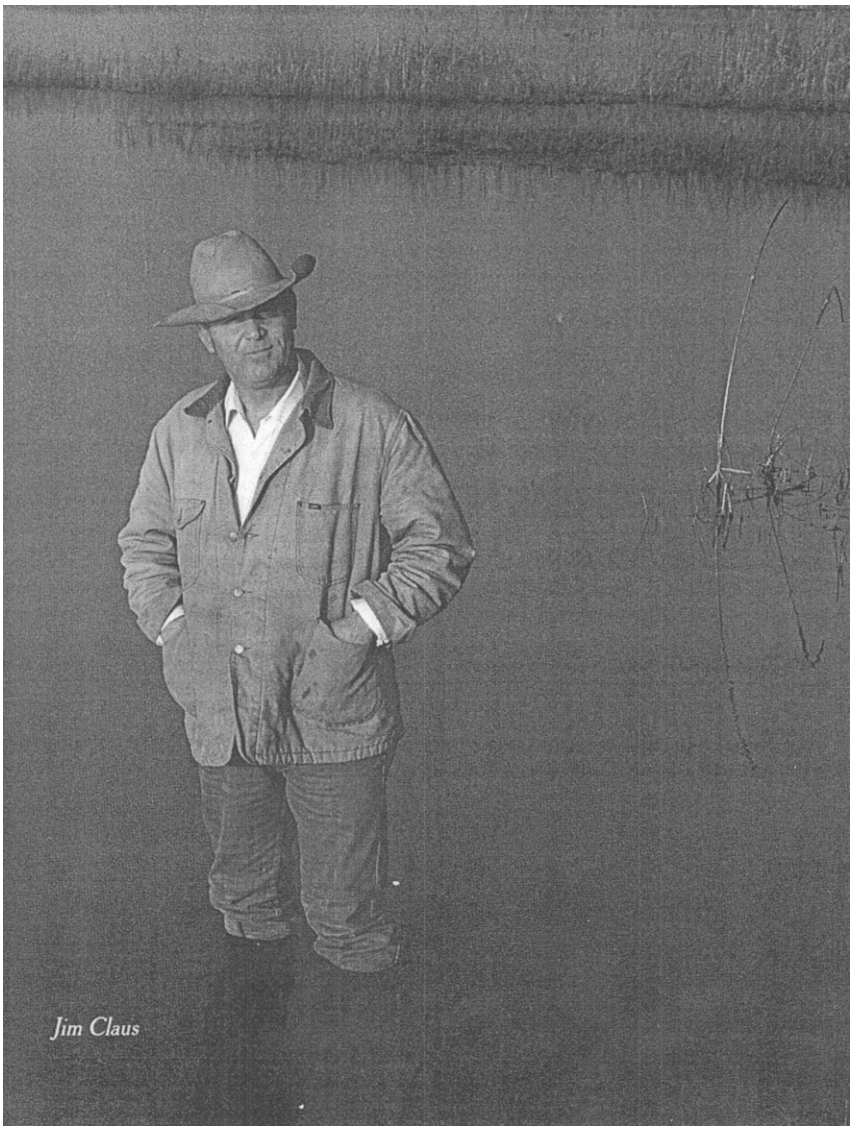
	Great deal of conf	Some	Not very much	Very little	DK/ref
15 Private developers	6%	29	24	37	4
16 Your city or town government	12%	49	14	21	4
17 Your county government	7%	54	15	20	4
18 Your state government	8%	54	15	21	3
19 The federal government	6%	40	21	31	3
20 Neighborhood associations and civic groups	20%	47	12	15	6

DEMOGRAPHICS

GENDER:	MALE 48%
	FEMALE 52
RACE:	WHITE 82%
	BLACK 12
	HISPANIC 6
AGE:	18-24 13%
	25-34 19
	35-44 22
	45-54 17
	55-64 11
	65+ 16
	DK/REFUSE 2
EDUCATION:	<HS/HS GRAD 43%
	SOME COLLEGE 23
	COLLEGE GRAD 32
	DK/REFUSE 2
INCOME:	<$25K 19%
	$25K-$35K 13
	$35K-$50K 18
	$50K+ 27
	DK/REFUSE 23
REGION:	NORTHEAST 20%
	NORTHCENTRAL 23
	SOUTH 36
	WEST 22

APPENDIX 1


San Francisco Examiner
IMAGE
JUNE 10, 1990
Imagining San Francisco:
Literary luminaries Mark Helprin, Richard Rodriguez and William Gibson rethink The City
PLUS:
Alice Adams falls in love



Jim Claus

Down the drain

He's been reviled as a crank and a crackpot, but Jim Claus took on the government and agribusiness over one of the worst toxic dumps in the West — and won.

all Jim Claus the swamp fox.

The man who took on everyone from the Secretary of the Interior to California's most powerful farmers to force them to admit that the way we irrigate farms is poisoning the West has suffered the fate of most whistle blowers. He was driven from his home, had his livelihood destroyed, was vilified as a crank and troublemaker and rarely received credit for his single biggest victory: a 1985 state order to shut down the farm waste water evaporation ponds at the Kesterson National Wildlife Refuge, an order that forced the federal government to reexamine its irrigation practices throughout the American West.

But after spending the 1980s fighting in the courts, pleading his case before local, regional and state water boards and lobbying the media and agricultural scientists, Claus is making it clear to all but the most obstinate that wetlands for protected bird species are not good places to dump farm drainage water laden with deadly poisons.

Five years after he won his historic Kesterson cleanup order, Claus is back in federal court to force a solution to the drainage crisis in the western San Joaquin Valley. He wants to make sure that the type of toxic farm drainage water that ravaged Kesterson doesn't destroy other rivers and wetlands that have become disposal areas for irrigation projects all over the West. "Much of the agricultural effluent in the San Joaquin River is being sucked up at the federal pumps in Tracy and sent back down the Delta-Mendota Canal and the state Aquaduct to contaminate not only western valley farmland but the drinking suppplies sent over the Tehachapi Mountains to Southern California," Claus wrote in his latest federal lawsuit.

The problem at Kesterson was selenium, a normally harmless trace element that is toxic in concentrated doses and causes a variety of ailments, including birth defects and death. Selenium from the western San Joaquin Valley soil was contaminating the irrigation water, which in the late 1970s was discharged into the Kesterson Reservoir, where it quickly polluted the food chain. By 1983, the bird sanctuary 80 miles southeast of San Francisco was dying. Dead birds floated everywhere in the stinking evaporation ponds.

But if selenium was the immediate culprit at Kesterson, Claus believes the real killers were members of the so-called Hydraulic Brotherhood, a powerful network of politicians, reclamation officials, engineers, scientists and rich farmers who be-

By Lloyd Carter

Photographs by Elizabeth Mangelsdorf

The Kesterson Reservoir, *80 miles southeast of San Francisco (see map, opposite), is a refuge for migrating geese, ducks and other water fowl. Inset, right, the now unused San Luis Drain, was "temporarily" dumping farm drainage at Kesterson while the government studied its controversial plan to eventually flush the water into the sea via the San Francisco Bay. But in 1983, dead birds and deformed embroyos started turning up at Kesterson in large numbers. The culprit was selenium, a trace element in the soil, toxic in concentrated doses, that had dissolved in the irrigation water. Opposite top (l. to r.) embroyo with curled lower beak and missing eyes, wings and legs; embroyo with missing eyes, curled lower beak, only one toe on each foot, upper legs shortened and twisted; embroyo with missing eyes, legs and lower beak, elongated upper beak, eroded nostrils, only one small wing; and normal embroyo. From the lab of Dr. Henry M. Ohlendorf of the U.S. Fish and Wildlife Service.*

lieved without question that California's rivers should be rerouted to develop the western valley desert. It seemed like a good idea 30 years ago, and a lot of those factory farmers in the western valley will argue fiercely that it's still a good idea.

The problem in the western valley is that all the irrigation over the last half century has waterlogged the land, and unless it is periodically drained to lower the groundwater table, salts and toxins just below the root zone kill the crops. And there are a lot of toxins in western valley soils just as nasty as selenium, things like arsenic and boron, heavy metals, uranium, cadmium, mercury, chromium and sodium sulfate. Because of the drainage problem, plans were made in the 1960s to build a massive canal — the San Luis Drain — to carry the waste water to the Sacramento-San Joaquin Delta, where it could be "safely" flushed through the San Francisco Bay to the Pacific Ocean, the ultimate salt sink.

But, unsurprisingly, Delta and Bay Area residents were suspicious of the scheme and demanded scientific studies to prove that it was safe. So in the 1970s, with studies underway, the Hydraulic Brotherhood decided to use Kesterson as a "temporary" dumping ground for drainage from the Westlands, the nation's biggest federal irrigation district — legendary for its political muscle. That's when Jim Claus came onto the scene and muddied the waters.

A successful Bay Area real estate investor with a Stanford Ph.D. in urban geography, Claus started going duck hunting in the Merced County wetlands around Kesterson in the early 1970s and fell in love with the area. By the late 1970s he'd bought several combination cattle ranch/duck clubs there, including 950 acres right next to Kesterson.

Claus did not notice anything unusual until 1981, when his forage grasses wouldn't grow and his cattle started losing weight, getting sick and dying. The Freitases next door were having similar problems; their cattle were dropping dead every time they drank the foul smelling water that was starting to bubble up on their property. Local hunters reported nabbing ducks that were sickly and underweight, some with damaged feather patterns. Another neighbor, Frank Schwab, found a goose with a stunted leg. Claus began speaking out and things got weird. "We had death threats, we couldn't eat in restaurants, we weren't welcome in town anymore. When we were at the hearings we had to keep moving our vehicle," Claus said. "We were attacked in every possible way you can imagine, including having our house burglarized. We had people trespass on our property, destroy items, give us (threatening) messages, call us on the phone, threaten to maim and kill our children and kidnap our youngest child."

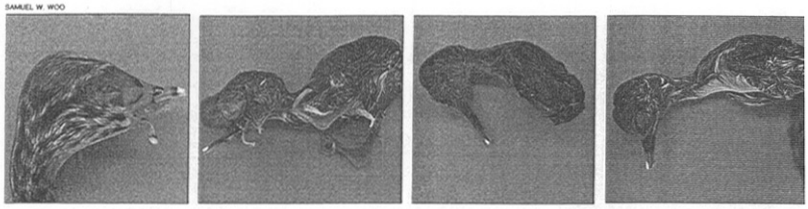
The pressure from the federal government was more subtle. The Bureau of Reclamation, which operated the Kesterson evaporation ponds, said there was no leakage from Kesterson to adjacent ranches. The water was fine, they insisted, cleaner than local groundwater.

Scientists later found that selenium in the drain water had quickly infected Kesterson plant life, then become more concentrated as it moved up the food chain to the migratory ducks, which started showing bizarre embryo abnormalities like missing eyes, wings and feet and corkscrewed beaks. But the bird deformities did not become public knowledge until the fall of 1983, five months after they were discovered.

By 1984, Kesterson was at full virulence. Birds were dying by the thousands. As many as 2,600 were picked up in a single day, 15,000 in a month. Bureau officials called it avian cholera, but 12 of the 14 birds that were actually tested had died of selenium toxicosis.

In late April of that year, Claus and his wife, Karen, appeared before the Central Valley Regional Water Quality Control Board to demand that Kesterson be cleaned up or closed. The regional

SAMUEL W. WOO



board, dominated by farming interests, refused to acknowledge that there was even a problem. So the Clauses appealed to the State Water Resources Control Board with a massive stack of paperwork they had accumulated to document their claims, including proof that scientific warnings had been issued all through the 1960s and 1970s about the dangers of the kind of drainage water being dumped at Kesterson.

As early as 1949, David Love of the U.S. Geological Survey had proposed a thorough study of selenium in the West, warning that it could save the country tens of millions of dollars and much future grief by keeping bad land out of production. Love says politics killed his proposal. Agriculture Department officials admitted in 1961 that they feared a selenium survey could hurt property values all over the West.

Reclamation officials and agriculture interests, who wanted to continue dumping drainage at Kesterson, rushed busloads of farmers to the December water board hearing — but to no avail. On Feb. 5, 1985, Jim and Karen Claus won the order to clean up the reservoir.

Six weeks later, just a few days after Claus could be heard thundering righteously about government stupidity on "60 Minutes," former Interior Secretary Donald Hodel ordered the reservoir closed. It was a stunning move. Twenty-five years after it had been authorized by Congress and narrowly approved by a majority of California voters, the still unfinished state-federal plumbing job to irrigate the western valley had deadended in the sulfurous Kesterson swamp. Since the closure, the Bureau of Reclamation has spent nearly $50 million to study and undo the mess, and will spend $3.5 million a year, every year for the foreseeable future, just to keep an eye on it.

The shutdown sent shock waves through California's $17 billion-a-year agriculture industry that would eventually reverberate around the globe. Kestersons were springing up everywhere, including the Soviet Union, where a scheme to grow cotton in the desert killed the Aral Sea, once the world's fourth largest fresh water lake.

Jim Claus shook the temple of the Hydraulic Brotherhood to its foundations. It may never recover. Whether the Clauses will recover is another matter.

When the death threats grew serious and their Kesterson area home was bur-

CHRIS MORRIS

glarized, they took their children and fled, first to Beverly Hills, then to Ventura and finally to a country home near Portland, Ore. Claus briefly considered moving to Australia but decided to stay and fight. "At that point, if I had stayed any length of time in Australia, I simply would not have come back to the United States. But I felt that I had a responsibility to stand up for what was right. I realized that I could not simply walk away from the situation," he said.

The family's bitter battle to recover damages to their ranch lasted two years and ended in July 1987 with the government agreeing to buy 90 acres. It was an expensive war, fought in a Washington, D.C., courtroom with no coverage by the TV cameras and reporters who had flocked to the earlier Kesterson hearings in Sacramento and Los Banos.

Claus served as his own attorney and was almost jailed for contempt when he accused the judge of being in cahoots with the government lawyers. At one point, the government tried to charge the Clauses $170,000 for copying documents the Interior Department was providing free to the news media. After a sympathetic *Reader's Digest* reporter had his magazine's lawyers question the Justice Department's attorneys about their tactics, the department settled, though without admitting that the government had done anything wrong. In the end, Claus had to concede that the fight had cost him more than his ranch was worth.

Except for an occasional foray into water board hearings on the Kesterson cleanup, Claus dropped from sight for a while, keeping a low profile in Oregon. But in mid 1989 the swamp fox emerged with a new lawsuit.

This time Claus is fighting the Interior Department over its failure to protect migratory birds in the Tulare Basin, a factory farm area in the southwest corner of the San Joaquin Valley where there are more than 7,000 acres of drainage water evaporation ponds, many far deadlier than Kesterson. National wildlife refuges established there to shelter migratory ducks and geese are woefully inadequate and lack secure water supplies. One wetlands "refuge" known as Pixley has no water at all. Presumably the ducks bathe in the alkali dust.

The southern valley is the domain of some of the state's most powerful landholders, including J. G. Boswell, who owns 140,000 acres, and the Chandler family, owners of the *Los Angeles Times*. Perhaps coincidentally, *Times* coverage of the Tulare Basin dispute has been virtually non-existent. Republican Congressman Charles "Chip" Pashayan, who represents the Basin, has ignored the problem. Boswell is one of his largest contributors.

U.S. District Judge Lawrence Karlton, who has had many thorny California water issues before him over the years, is faced in the Claus suit with one of the most difficult decisions of his career. Acting again as his own attorney, Claus has amassed a mountain of persuasive evidence. U.S. Fish and Wildlife officials have said publicly that there are Migratory Bird Treaty Act violations occurring in the Tulare Basin, where bird deformity rates are higher than they ever were at Kesterson. But Justice attorneys insist that the law against killing migratory birds is being enforced.

Claus says he finds himself once again defending public resources because government agencies entrusted to do so have failed so miserably. "If one has to find the individuals with the least conscience and the most fight, one must look at the lawyers. Every time a public servant lies, there is a government lawyer not far behind him telling him that he doesn't have to tell the truth. The lawyers manage to remove any personal sense of responsibility."

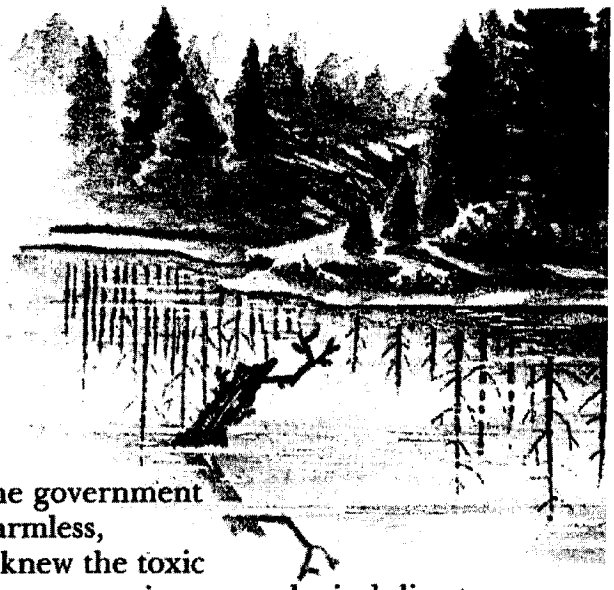
The dozens of professional papers and doctoral theses written about Kesterson over the last five years always credit the state water board or Donald Hodel with closing Kesterson. As if either would have taken action without the screaming and relentless Jim and Karen Claus. It's a slight that still rankles the Clauses, but there are signs that they are at last receiving recognition for their efforts. This year they spoke at the annual selenium conference at UC-Berkeley where Jim was prevented from speaking seven years ago by Interior officials who labeled him a crackpot.

Claus still owns the Kesterson Gun Club — which he renamed the Blue Goose. He says he will sell it to the government if the government wants to buy it. Claus still likes to prowl his swamp, making improvements in the marsh, watching ducks fly overhead. The duck population is at an all-time low and he doesn't hunt anymore. He talks instead of turning all 50,000 acres of privately owned duck clubs in the area into public wetlands for future generations to enjoy.

There's been enough killing, he says. ■

Lloyd Carter is a reporter for United Press International in Fresno who won the San Francisco Press Club's Best Environmental Coverage award in 1985 for his reporting on Kesterson.

APPENDIX 2



Though the government called it harmless, Jim Claus knew the toxic waste water was causing an ecological disaster. His lonely battle against the bureaucrats dramatizes a national dilemma

The Case of the Poisoned Wildlife Refuge

By Randy Fitzgerald

One morning in late 1981, 15 cattle belonging to Jim and Karen Claus drank from an irrigated pasture on their ranch in California's San Joaquin Valley. And one by one, the cows lay down and died. A foul odor began to permeate the ranch. To Jim, it seemed to originate in the Kesterson National Wildlife Refuge next door. As months passed, fish disappeared from streams, frogs from irrigation ditches, rabbits from fields. Birds fell dead. The environment was degenerating before their eyes.

For Jim and Karen Claus and

ILLUSTRATION: JAMES E. DYEKMAN 133

their three children, their 1400-acre ranch and duck-hunting club represented their savings and a lifelong dream. Both held Ph.D.s—Jim in land-use economics, Karen in psychology—and they had been trained to ask questions. But when they tried to raise an alarm, people ignored them. No one wanted to believe that the marshy 5900-acre refuge for migratory birds could be dying.

Investigating further, Jim began to suspect something was wrong with the irrigation water, the valley's lifeblood. He decided to notify officials at the U.S. Fish and Wildlife Service, which ran the Kesterson refuge. Jim had been introduced to FWS in 1979 when he entered into an easement agreement with them. In return for a pledge to keep their property as it was—native pasture and a duck habitat—landowners were promised the government would protect the area, called "Grasslands," as permanent wetlands.

In late 1981, Jim flew to Portland, Ore., to warn FWS regional officials: "Your refuge is killing the very life it is supposed to protect." He says that they tried to assure him nothing was wrong with the water and perhaps predators were depleting the wildlife. But once back home, he received the first of a series of packages, apparently mailed anonymously by sympathetic employees of the FWS and the Bureau of Reclamation.

Inside, Claus found reams of federal documents relating to Kesterson and the surrounding 50,000 acres of the mostly private Grasslands. He was shocked. Kesterson was being transformed into a toxic waste dump. "I can't believe our government is doing this to us," he raged. "This water is dangerous!"

"Then we must close Kesterson," Karen replied, "no matter what it costs."

Jim first had to find the source of the pollution and who was responsible. His search would uncover a problem with national implications.

Corporate Muscle. Jim found that water flowed into Kesterson along an 83-mile-long drain from the Westlands Water District, a group of several hundred farming operations southwest of Fresno. An impermeable clay layer underlies much of Westlands' 603,000 acres, creating serious drainage problems. High salinity levels tended to combine here in the irrigation water with naturally occurring trace elements such as selenium—toxic at high levels—in Westlands' soil. This water had to be removed after use or it would poison crops. So farmers hooked up subsurface tile drains to pipe used irrigation water away, via the Bureau of Reclamation's master drain, to Kesterson.

Kesterson, with its 12 evaporation ponds, was originally planned as part of a drainage system through which the agricultural waste water would flow, eventually to reach the San Francisco Bay delta. But in 1975 a shortage of funds and environmental concerns over high salinity

and pesticides in the water prevented the system's completion, and the drain stopped at Kesterson.

Tile-drain water had begun flowing into Kesterson in 1978, and by 1981, the year that Jim noticed animal deaths and deformities, the waste water was all from tile drains. Sources say that for several years Reclamation continued to deny there was a problem.

Claus also began to understand the political muscle he was up against. These were not ordinary farmers. Westlands' membership was dominated by large corporations, which, with other landowners, exercised considerable influence over the Bureau of Reclamation. Westlands was America's biggest irrigation district and the largest recipient of federally subsidized water in the reclamation program.

To favor family farms, the law had limited those that could receive subsidized water to 160 acres. (It has since been raised to 960 acres.) This acreage limitation was circumvented by elaborate leasing arrangements. Further, as a Natural Resources Defense Council report notes, over half of Westlands acreage was permitted to be devoted to growing surplus government crops, especially cotton. Thus Westlands received subsidies for both its water and its crops.

Unanswered Complaints. Because Westlands is semi-arid, its soil can only be made highly profitable with enormous floods of cheap irrigation water. A 40-year contract, which went into effect in 1968 between Westlands and Reclamation, made this possible: it called for water deliveries from federal dams at $7.50 an acre foot. (A study by the Natural Resources Defense Council shows the true delivery cost is $97 an acre foot, with American taxpayers making up the difference.) And Reclamation charged Westlands only 50 cents an acre foot to divert the waste water away.

Jim Claus kneels on the ravaged soil of Kesterson

PHOTO: WARREN MORGAN

For months, Claus tried to warn his Grasslands neighbors about the danger in re-using Westlands' waste water, but to no avail. The

cattlemen feared that if word got out their water was toxic, their herds would become worthless and property values would plummet.

As Claus persisted in his campaign, his family was harassed. Vandals ransacked their home, and an anonymous caller threatened to harm his family. But before long, other landowners adjoining Kesterson began experiencing problems. On Frank and Janette Freitas's 5500-acre ranch, sheep and cattle started dying, and gardens refused to grow as Kesterson water began seeping into their properties.

Jim still clung to his faith that, given the facts, officials would take corrective action. On March 14, 1984, he and Karen met with a ranking Reclamation official in Sacramento. They expressed their belief that toxic seepage from Kesterson was destroying their land. The meeting produced no results but the couple determined to continue to fight.

They filed a formal complaint with the California Regional Water Quality Control Board, Central Valley Region, requesting immediate enforcement of the water-quality law. Months of research went into Jim's presentation. But the board denied his request.

Genetic Nightmare. Jim returned home defeated. Then another package arrived. "Karen, we've got them!" he exclaimed.

New memos laid out the full story. Reclamation *knew* about scientific studies showing that selenium levels at Kesterson were high enough to kill the fish population. In June 1983, environmental specialist Felix Smith of the FWS and two other scientists had been sent there to check on how agricultural waste water was working. Apparently, Reclamation and the FWS had been using western wildlife refuges as waste-water dumps for several decades—without rigorous studies to determine possible toxic effects. Now the scientists found deformed chicks without eyes or legs. The marsh had degenerated into a genetic nightmare. Although Reclamation claims it acted as quickly as it could, critics charge that these findings were not acted on for quite some time.

Jim and Karen Claus now appealed the regional board's decision to the state board. With new testimony from government officials and others belatedly rallying to the Clauses' side, a case emerged that the board could not ignore. On February 5, 1985, the board concluded that drainage of waste water into Kesterson Reservoir posed a hazard to the environment, that the site must be cleaned up and that state water discharge standards should be enforced.

On March 15, 1985, Interior Secretary Donald Hodel ordered Kesterson closed. But Westlands launched a fierce lobbying counterattack and two weeks later Secretary Hodel backed off, announcing a phased shutdown, which would allow Westlands use of Kesterson

as a water dump until July 1986, when it would be closed.

Jim Claus had sued the United States in U.S. District Court for damages relating to Kesterson seepage. The Justice Department asked the court to dismiss the suit, calling it "a patently unmerited effort to open the federal treasury to their gain." The suit did not proceed. Claus then sued the government in U.S. Claims Court. Supporting his case were the findings of Herbert Skibitzke, former senior research hydrologist for the U.S. Geological Survey: The land surrounding Kesterson "will not be redeemable in a reasonable time or at a manageable cost. The water pouring onto the land is inconceivably bad, and the damage is essentially permanent."

Ecological Disaster. When Claus requested government documents bearing on his case, he was told he must pay over $170,000 for search and photocopy costs. "The government's intent is to bankrupt the Claus family or force them to withdraw the lawsuit," contends Bruce Nahin, a Los Angeles attorney representing them. The squabbling over blame continues, while the Clauses, Freitases and another family involved have been reduced to financial ruin, pain and despair.

Observers believe Justice and Interior are fighting so hard because they want to avoid a precedent that might encourage similar suits. Last year, a survey by the FWS found that 85 wildlife refuges were suffering from documented, suspected or potential problems—most caused by agricultural irrigation wastes that Interior has allowed to be dumped in them for years. The Stillwater National Wildlife Refuge in Nevada, for instance, has selenium levels comparable to Kesterson's. Early this year millions of fish and scores of birds were found dead there.

In 1985 Jim Claus and his family moved to Portland, Ore., where they are now struggling to establish new careers. He takes small consolation from events that have transpired since he first spoke out. Although Kesterson was closed to drainage dumping after June 30, 1986, Westlands still receives taxpayer-subsidized federal irrigation water for its toxin-producing soils.

Donald Anthrop, environmental professor at San Jose University, calls the episode "an ecological disaster brought about by subsidized irrigation of marginal land that should never have been irrigated in the first place." And the Natural Resources Defense Council asks, "Does the profit of a relatively small number of farmers justify water subsidies that may create an insoluble threat to the environment?"

The Interior Department should settle damage claims with landowners around Kesterson. More important, the FWS and Bureau of Reclamation should put an end to the ecological disaster at all wildlife refuges in the West. We must not let our nation's wildlife refuges become toxic dumps.

137

Mr. CHABOT. Thank you, Mr. Claus.
Mr. Manley?

STATEMENT OF ROBERT MANLEY, ESQ., PARTNER, MANLEY, BURKE, FISCHER & LIPTON

Mr. MANLEY. Thank you, Mr. Chairman Chabot. I'm happy to be here. I'm here on behalf of the American Planning Association, and

I am accompanied by Mr. Stuart Meck, who was the principal author and investigator of the Growing Smart project.

I was on the task force that helped design the basic approach. And as the Chairman may remember, probably 80 percent of my clients are the people who are in the regulated community: property owners, businesspeople, and neighbors.

And, for the record, almost every week I walk from my home on 9th Street through Over-the-Rhine to Findlay Market and back.

Now, Mr. Chairman, I'm very pleased to be here, and I hope that I can be helpful. The American Planning Association chose to focus extensive effort and resources on the reform of planning enabling legislation quite simply because our planning tools are out of date, from another era. These laws form the foundation of how planning occurs in communities, thus they affect the well-being of all citizens because they shape both the built and natural environments in our urban and rural areas.

Despite this vital role, planning in most States continues to be guided by a model statute drafted by an advisory committee appointed by the then-Commerce Secretary Herbert Hoover in the Twenties. When these acts were drafted, the Nation was a different place. Approaches that worked in the 1920's are plainly inadequate for today. Citizens are demanding new choices concerning land use, housing, employment, transportation, and environment.

In response to citizen interest, the concept of smart growth has arisen. I have seen this groundswell movement all over my areas of activity.

Smart growth is a set of public policies designed not to stifle growth but to promote development in ways that create communities of balance, consumer choice, and lasting value.

Let me use Ohio for an example. Ohio for decades was a leader in planning, and now we're finding that we are looking backward, we're ineffective, largely because Ohio has not rethought the issues around land use regulation since the 1920's. In those days, urban settlements like Cincinnati were surrounded by many miles of farm land.

All across the State, units of local government have zoning without any comprehensive planning. As a result, many planning decisions or zoning decisions are based upon cronyism, prejudice, and political popularity. This is very costly to the communities, because development becomes haphazard, and that's why you find all over the country abandoned shopping centers that were put in the wrong place.

And it also is very damaging to the property owners and developers because it creates uncertainty. There is no way in which a developer or a property owner in Ohio can look at a—buy a piece of property and look at the comprehensive plan for the area and the zoning code and anticipate what he can do or cannot do. When he walks into a zoning hearing, he knows that it's unpredictable what the outcome would be.

As a result, the investment—the development community and the ownership community is handicapped. And in my observation, this is true not only here in Ohio, but in other States across the country.

Jack Kemp was the Secretary of HUD, and he was the man who solicited a report, which resulted in a recommendation that we rethink the way in which we do zoning.

And the book that was produced by Mr. Meck and many, many other people under guidelines that were created when our task force was in place is really nothing more than an encyclopedic discussion of the problems and options for solutions. It's a big menu.

And to say that—to pick and choose what part of the menu are to be applied to a particular community is up to the local community to pick and choose what they want. It is not a top-down arrangement. It actually—it's coming as a demand from a wide spectrum of the public at large.

And to suggest that there's something wrong with having all these options is like saying, "Oh, you shouldn't publish the 'Encyclopedia Britannica' without removing the chapter on abortion." It's nonsense.

The study is a clear, helpful tool to help communities solve the difficult problems that they all recognize, and it gives a wide menu of options. And all the options are options that have been tried from place to place and have a proven track record. However, they are not recommended for every community. There are alternative ways to go about it, and it's up to the local community to select what alternatives they want to pursue.

One final thing: Zoning laws have, to the best of my knowledge, always had criminal sanctions. And that's not a new idea. I don't know why it would be even suggested that was a new idea. But they always have, and, indeed, I even arrested somebody who tried to tear down trees in Greenhills in violation of the zoning thing, zoning code.

But, in any event, I appreciate the opportunity to be here, and I'll be available to answer questions, with Mr. Meck's help, at the appropriate time.

[The prepared statement of Mr. Manley follows:]

PREPARED STATEMENT OF ROBERT MANLEY

Good morning Chairman Chabot, Ranking Member Nadler, and members of the subcommittee, I am Robert Manley, partner with the law firm Manley, Burke, Fischer and Lipton. I appear before you today on behalf of the American Planning Association, and I am accompanied today by Stuart Meck, FAICP, principal author and investigator of the Growing Smart project.

The American Planning Association represents 32,000 professional planners, planning commissioners, land use professionals, and citizen activists interested in shaping the vision for the future of their communities. APA's members are involved in formulating planning policies and land-use provisions at all levels of government. APA has a long history of promoting public policies to improve quality of life in the nation's communities and neighborhoods through better planning.

In addition to being a long-time member of the American Planning Association, I am an attorney in private practice dealing with a large number of matters on real estate development, land use, local government law, and environmental law. I have had the opportunity to represent developers, communities, and citizens alike in the course of my years of practice and in doing so I have developed a deep understanding of the issues and complexities that arise in conjunction with planning and development.

It was my experience in dealing with outdated state planning statutes and inadequate local planning that led me to participate in the original APA task force that designed the project under discussion this morning, Growing Smart.

Mr. Chairman and Ranking Member Nadler, I appreciate the opportunity to offer testimony at this important hearing. Growing Smart is a landmark research project that promises to be an invaluable tool for improving our communities' economic vi-

tality and quality of life enjoyed by their residents. I hope my appearance here this morning will help dispel many of the myths and misinformation regarding Growing Smart, as well as outline the vital importance of planning reform initiatives.

Growing Smart is the American Planning Association's (APA) seven-year project to draft the next generation of model planning and zoning legislation. The project has involved a wide variety of partners and advisors and has produced multiple research and education products related to the revision of state enabling legislation for planning and land use.

APA chose to focus such a high level of attention and resources on the reform of planning enabling legislation because, quite simply, our planning tools date from another era. These laws form the foundation of how planning occurs in communities. State statutes delegate power to local governments to prepare comprehensive plans, zone land, regulate subdivisions, require the installation of public facilities, and redevelop older areas. Thus, they affect the well being of all citizens because they shape both the built and natural environments in our urban and rural areas.

Despite this vital role, planning in most states continues to be guided by model statutes drafted by then-Commerce Secretary Herbert Hoover in the 1920s. These models, the *Standard City Planning and Zoning Enabling Acts*, were designed to support the rise of zoning and were almost universally adopted. When these acts were drafted, the nation was a different place. Growth was largely confined to central cities and the few suburbs served by commuter trains. In the 1920s, we saw land principally as a commodity, something to be bought and sold, whose value needed protection based on zoning. After World War II, a variety of factors shifted development outward from central cities to the vast rural areas beyond.

Today, we view land as a resource for which there are competing social uses. The planning process is the best means for communities to make decisions about those uses. Approaches that worked in the 1920s are plainly inadequate for today. Citizens are demanding new choices concerning land use, housing, employment, transportation, and the environment. These demands are reflected in the broad and growing public movement coalescing around the concept of smart growth.

Smart growth is a set of public policies designed not to stifle growth, as some critics would have it, but to promote development in ways that create communities of balance, consumer choice, and lasting value. Smart growth is planning, designing, developing, and revitalizing communities to promote a sense of place, preserve natural and cultural resources, minimize public outlays, and equitably distribute the costs and benefits of development. Smart growth can be the basis for promoting economic development and preserving property values, not the antithesis. Updated planning statutes are essential to empowering communities to pursue a smart growth vision consistent with their local vision and values.

Ohio, for decades, had been a leader in sound planning. The first Comprehensive Master Plan of any city in North America was done in 1925 for the City of Cincinnati. *Euclid v. Amber Reality*, 272 U.S. 279 (1926), the case where the Supreme Court of the United States upheld the power of governments to engage in regulation of land through zoning arose through Ohio. The Ohio Planning Conference is the oldest organization of citizens and professional planners in the United States having been founded in 1917.

Ohio has fallen from a position of leadership to a position of backwardness and ineffectiveness, largely because Ohio has not rethought issues around land use regulation since the 1920s. In those days, urban settlements were surrounded by many miles of farmland. Ever since suburbia began to develop the farmland around major cities has been replaced by independent urban settlements. Each community has its own zoning without focusing on the relation between the community and the region in which it exists. All across the state, unites of local government have zoning without any comprehensive planning document that is reasonably up to date. As a result, many zoning decisions are made based upon cronyism prejudice and political popularity.

This is very costly to the communities and it is very costly to developers. Communities suffer because without a current comprehensive master plan, they make zoning decisions without any guidelines. Developers and property owners suffer because there is no predictability. When they walk into a zoning hearing, they have no idea what the outcome will be. They also have no basis on which to develop investment-backed expectations when they buy real estate.

If Ohio rethinks the land use regulation policies, the state and local governments will look for a way to develop regional plans through cooperation among several local governments and foster conformity between zoning decisions and these regional plans.

The reality is that different municipalities in the same region are not competing with each other. It is the region that is competing with the Toronto region, the Mu-

nich region, the Barcelona region, and various regions within the United States. At the present time, land use policies and zoning policies in Ohio are as Balkanized as historically public affairs have been Balkanized in Yugoslavia.

Earlier this week I was speaking before a number of citizen planners on planning commissions from southwestern Ohio. One of them asked how to get Ohio back into a position of leadership. I was happy to be able to point to American Planning Association's *Growing Smart Legislative Guide Book* as a menu of options that can be selected to fit the special needs of different regions within the state.

The status of land use regulation does great harm to property owners and developers. This is manifested by the reality that any group of Nimbys (Not in My Back Yard) can keep any development tied up in the courts any where from four to seven years. If the state of Ohio were to encourage the local governments to develop comprehensive regional plans and to administer zoning in compliance with those plans, developers and property owners would have reasonable predictability and would be less vulnerable to protracted delays caused by vexatious zoning litigation initiated by Nimbys.

Not only does the present chaotic situation damage developers and property owners, it damages the public good because wrong decisions are made for the wrong reasons on a regular basis. These wrong decisions damage not only the property owners, but also their neighbors.

When a property owner buys real estate, the property owner should be able to look at the existing comprehensive plan for the area and the zoning and have a reasonable understanding of the uses that are going to be available to the property owner. That is rarely true in Ohio today.

I have had enough experience in other parts of the United States to say that is rarely true throughout most of the United States. This is largely for the same reason, that is, local and state officials have not rethought the issues since the 1920s.

The *Growing Smart Legislative Guide Book* is similar to an encyclopedia of factors to be considered that offers a diversified menu of approaches that state and local governments can apply to themselves and to their regions.

The idea for Growing Smart originated from two sources at about the same time. The concept of a new generation of model planning and zoning enabling legislation was first recommended by the Advisory Commission on Regulatory Barriers to Affordable Housing, which was created during the administration of President George Bush and Secretary Jack Kemp at HUD. The Commission, in its 1991 report, *"Not in My Back Yard" Removing Barriers to Affordable Housing*, recommended that:

"HUD assume a leadership role and work with government and private-industry groups, such as the American Bar Association, the American Planning Association, National Association of Home Builders, National Governors' Association, League of Cities, State community affairs agencies, and others to develop consensus-based model codes and statutes for use by State and local governments. Specifically, the Commission sees a need for a new model State zoning enabling act with a fair-share component, model impact-fee standards, and a model land-development and subdivision-control ordinance."

I would like to note that all of the recommendations in the Commission's report were subsequently included in APA's Growing Smart$_{SM}$ *Legislative Guidebook*, including state and local barrier removal plans, state zoning reform, conflict resolution or mediation, streamlining state regulatory responsibility, time limits on processing and approvals, and state impact fee standards.

Also in 1991, the Chapter Presidents Council of the American Planning Association asked the APA Board of Directors to direct the Research Department to investigate the development of new model planning and zoning enabling legislation to replace the two model acts from the 1920s. The council believed that APA should provide leadership in the reform of the nation's planning statutes to meet the needs of the next century. APA created a task force to develop an approach to draft the model legislation. The task force of planners and attorneys met in Chicago in March 1991. I was honored to be part of that original task force. I knew and respected the professional experience of most of the task force members. We worked very hard, but there seemed a certain obvious courses of action that emerged from the collegial deliberation of the highly experienced persons who worked intensively together. The report of that task force ultimately led to the submission of a proposal to the U.S. Department of Housing and Urban Development and the Henry M. Jackson Foundation in 1993, and funding of the proposal in 1994.

The work of the Growing Smart project during the intervening years culminated recently in the publication of the *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change, 2002 Edition*. The Guidebook is essentially a compendium and analysis of options for planning statutory reform. The

Guidebook presents an overview of key issues, sample statutes from states addressing these issues, and commentary on various approaches.

The development of the Guidebook was guided by several basic principles. Most importantly, that, unlike the 1920s model ordinances, there is can be no "one-size-fits-all" approach. Instead, the Guidebook provides a range of alternatives, with commentary on the pros and cons of each approach, out of the recognition that states should select or adapt the approach that best fits the local context. Some critics maintain that the Guidebook is a single prescription that states are being urged to adopt. This is simply not the case.

The *Guidebook* does not make specific recommendations for each state. States can pick and choose from the proposals for enabling legislation in the Guidebook. The Guidebook is reference book, not a policy prescription. Because it is a compendium of options, with commentary, it cannot be "adopted." Further, because enabling legislation "enables," local governments can decide themselves whether or not they wish to use certain powers granted to them.

Further, the project from the outset only considered including models based on existing statutes whose impact and effectiveness could be objectively evaluated. The Guidebook does not contain or recommend new, untried statutes. Again, some critics have erroneously claimed that the Guidebook contains prescriptions for radical change. The reality is that the Guidebook contains nothing that is not already on the books, with a track record. The product is invaluable for modernization efforts because it carefully details the implications and impacts of statutes from across the nation with commentary on how these might be adapted or modified for particular circumstances.

Another cornerstone of Growing Smart was broad-based participation and review. From its inception, an advisory council consisting of national organizations and representatives of an array of constituencies. HUD insisted on the creation of an advisory board to help provide feedback on initial drafts of the Guidebook. This body, called the Growing Smart Directorate, was comprised of all the leading national associations representing public officials: the National League of Cities; U.S. Conference of Mayors, National Association of Counties; National Conference of State Legislatures; National Association of Towns and Townships, Council of State Community Development Agencies, National Association of Regional Councils, and the American Planning Association. It was later expanded at HUD's request to include three members-at-large—one each for the built environment, the natural environment, and municipal law. The 18-member Directorate met twice each year for the duration of the project, hammering out consensus on all but the most contentious issues.

Each member of the Directorate was afforded the opportunity to write dissenting opinions on unresolved issues about which he or she felt strongly. The final Guidebook contains two such opinions, one written by Jim McElfish (member-at-large for the natural environment) and the other written by Paul Barru (member-at-large for the built environment). In addition to this formal advisorybody, APA continuously conducted outreach regarding Growing Smart with all manner of organizations and interest groups. In early 1995, we announced the Growing SmartSM project by mailing a cover letter, a 4-page project summary, and an "Invitation for Involvement" questionnaire to the CEOs of 161 national and regional interest groups. The questionnaire asked respondents to define for themselves the type of involvement that best fit their organization.

From 1995 to the present, APA has maintained a very robust outreach program. In addition to working with the advisory directorate, project staff mailed a semi-annual project newsletter to a list of over 800. We maintained a heavily visited project web site with all past newsletters, working papers, and published materials. As evidence of the project's openness to comment from all quarters, APA received over 320 pages of comments in just the last year of the project. Environmental groups, smart growth advocates, and organizations representing builders and developers all offered recommendations. Each comment was carefully considered. APA's approach to responding to each comment was carefully documented in a series of "change memos." By our estimate, over 85 percent of the suggestions made in these comment letters were accommodated in the Guidebook. The project was presented and discussed at conferences and workshops across the country as well. Growing Smart was certainly not conducted behind closed doors.

The Growing Smart project was undertaken through a cooperative agreement between the U.S. Department of Housing and Urban Development and APA. HUD also served as the lead agency for five other Federal agencies, including the Federal Highway Administration and the Federal Transit Administration in the U.S. Department of Transportation, the U.S. Department of Agriculture Rural Economic

and Community Development Administration, the U.S. Environmental Protection Agency, and the Federal Emergency Management Agency.

Cooperative agreements, as opposed to outright grants, require that the parties to the agreement share in the costs of the project. Over the project's seven years, about 28 percent of the total project cost of $2.47 million was paid for by private sources, comprised of APA, two foundations, and a corporation. The remaining 72 percent, or $1.78 million, was paid for by the six federal agencies. Private funding came from APA, the Henry M. Jackson Foundation of Seattle, Washington, and the Annie E. Casey Foundation of Baltimore, Maryland. The Siemens Corporation of Washington, D.C. provided a grant for the development of model statutes on state and local telecommunications planning.

APA's contractual relationship with HUD was clear and unambiguous with regard to the project's content. HUD was allowed, based on the agreement, the opportunity to reject final publication if the research was deemed faulty. HUD was also permitted to submit a dissenting opinion as part of the guidebook. The Department opted to forego both options.

However, critics of the project have misconstrued the import of these contract provisions and HUD's final actions. At no time was the project intended to represent an official HUD policy statement. It was, and is, a contracted research project whose findings were, and are, part of the public domain. APA always retained final editorial license. In fact, virtually the first words in the Guidebook are notice to the reader that "the contents of this report are the views of the authors and do not necessarily reflect the views or policies of HUD, the U.S. Government, or any other project sponsor."

While the Guidebook addresses the full array of planning-related policy concerns, today's hearing centers around two specific issues: impacts on economic development, particularly minority business owners and entrepreneurs, and impacts on private property rights. Additionally, the specter of vast litigation over these provisions has been raised. When it comes to promoting vibrant local economies, producing new small businesses, and protecting private property rights, we share common cause with our critics.

However, we believe that the planning reform improvements discussed and analyzed in Growing Smart are important components of realizing these objectives. Our current planning and development patterns are too often hindering new business development and generating conflict over private property. Growing Smart offers vital assistance to states and communities struggling with the consequences of change, whether rapid development or economic decline, and promotes policies that can lead to innovative solutions to improving local quality of life through better planning and land use.

Planners represent the public interest and that includes small businesses. We strongly believe the existing pattern of sprawl does more to discourage small minority business than any other single thing. Reforming planning statutes would curb the flight of investment from urban neighborhoods. As Sam Staley of the Reason Public Policy Institute has shown in his "Giving a Leg Up to Bootstrap Entrepreneurship", sprawl is the antithesis of reinvigorating central-city economies. Growing Smart encourages the streamlining of regulations and the removal of subsidies to favor greenfield development.

The impacts of sprawl under the current, out-dated system fall heavily on minority-owned businesses. For example, a 1998 study of Small Business Administration loan guarantees in the Chicago metropolitan region found that a disproportionate number went to higher-income, suburban fringe communities, which are also predominately white. Better planning would help promote reinvestment in minority neighborhoods and create development patterns with greater predictability and efficiency to spur, not inhibit, economic growth.

Reform envisioned and enabled by Growing Smart would provide improved predictability in the planning and development process. This kind of predictability does not aid only the development and construction industry, as important as they are. It also creates a better climate for all business investment, be it start-ups, expansions or relocations. Similarly, the kind of state and local planning processes espoused by all the optional statutory models contained in the Guidebook promotes efficiency in the investment of public funds in the location of government facilities and in transportation and utility infrastructure.

As in the business world, these public investments, if wisely and strategically made, can build upon and extend private investments, thereby lessening the need for new tax revenues. If poorly made—as often happens in places where the haphazard, low-density development called sprawl occurs—these public investments can be wasteful and fail to leverage private investment. So rather than constraining small business development or being inimical to it in any way, the Growing Smart

Legislative Guidebook actually proposes options for a rational framework within which sound investments can be made.

Finally let me emphasize that there is no better defense of private property than a good plan, implemented. Property has little value in the marketplace absent access, utilities, and our system of laws and administration that protects individual rights. Good planning assures everyone, not just the moneyed or powerful, equal treatment in the development process. Plans ensure development decisions will not change at the whim of local politics and special interests, but will be carried out over time on behalf of the whole community and its diverse interests. Good planning assures schools, parks, streets, utilities, fire and police stations and emergency services will be there to support private investment. Time after time, poll after poll, places Americans most want to live or visit, with the strongest economies, are those places that have a clear vision, a sound plan and effective and fair implementation.

Thank you, Mr. Chairman, Mr. Ranking Member Nadler, for the opportunity to address some of the concerns raised regarding Growing Smart and to detail for the Subcommittee the value of this project. One prominent syndicated editorial writer described Growing Smart as a "gift to the nation—tools we need to cope with a tidal wave of development . . . not some single planning recipe . . . but a menu culled from statute books across the nation." I certainly believe this project represents a landmark research product that helps improve communities and neighborhoods across the country through better planning.

This concludes my testimony, and I would be happy to answer any questions at the appropriate time.

Mr. CHABOT. Thank you, Mr. Manley.

Mr. Hymans?

STATEMENT OF GEOFFREY WILLIAM HYMANS, HOUSE REPUBLICAN CAUCUS, WASHINGTON STATE HOUSE OF REPRESENTATIVES

Mr. HYMANS. Good afternoon, Mr. Chairman, Congresswoman. My name is Geoffrey William Hymans, and I'm senior counsel for the Republican Caucus of the Washington State House of Representatives. My principle duties include advising the caucus on land use and transportation issues.

Mr. CHABOT. Would you pull that mike a little bit closer? I think it may be a little bit difficult for the folks to hear.

Mr. HYMANS. Is that better?

I come before you today on behalf of the citizens, businesspeople, and property owners of Washington State to express serious concerns regarding the American Planning Association legislative guidebook and to urge you to deny any funding to State and local governments to implement the guidebook.

The State of Washington has had 10 years of experience under a State-mandated growth management regime. The results of this experiment have been dramatic: increased congestion in our urban areas; increased housing costs; decreased economic development in our rural areas; a shift in development and prosperity from the rural parts of the State to the urban areas; and an ever-increasing amount of regulation by both State and local governments, not to mention the huge expenditures required by such regulation.

My written materials give you a short summary of the act, and I can provide a more extensive history to the Committee staff, if requested. But the extensive regulatory system described in my written materials, existing at both the State and local levels, simply breeds further regulation.

The perfect example of this, as described in my written materials, are concurrency requirements contained in Washington's GMA with regards to transportation facilities and recommended in

the APA legislative guidebook for other infrastructure. These planning requirements, local legislative implementation, administrative appeals, and agency programs and assistance have not been cheap.

By way of example, Jefferson County, a small county of 25,000 population, has spent $3 million and counting on its GMA implementation. The amount spent statewide, at both the State and local levels, is easily in the low hundreds of millions of dollars.

If Congress is considering grants to implement these policies nationwide, it will not be cheap.

The Puget Sound region in Washington has developed some of the worst congestion in the country over the past 10 years, the time period coinciding with Washington's growth management scheme. By now, a large body of research shows that the growth management schemes, particularly those that use urban growth boundaries and related methods to increase density, also increase congestion.

This is not really surprising. We start with the fact that Washington, like many States around the Nation, has reached almost a saturation point of one registered vehicle per licensed driver in the State. Therefore, the simple math of congestion goes like this: If you double density within a certain geographic area, even over time, but don't either double road capacity or have a large shift from low-capacity vehicles, such as cars, to high-capacity vehicles, such as buses, you will double congestion on the roads in that area.

Planners have an answer for this: Make the commute and the congestion so bad that folks will be forced to get out of their cars and take transit.

Yet even in the most dense urban areas of Washington, around Seattle and Tacoma, transit usage fluctuates, depending on what figures you look at, between 10 and 30 percent. This means that 70 to 90 percent of those new people you have placed in a more dense area are going to be driving their single-occupancy vehicles on the roads.

In Washington, we have already adopted transportation demand management programs, such as HOV lanes, commute trip reduction programs, and intelligent traffic control measures, not to mention already having a very extensive transit system available and building a new light rail.

Most people still drive solo, and the more dense you make an urban area, the more folks will want to use the limited road space.

Unless there is a massive road infrastructure investment in dollar amounts that will dwarf even the expensive smart growth implementation cost discussed above, adopting these density-promoting policies guarantees more congested roads.

Seattle has also been famous in the past decade for its high cost of housing. This is not just a Seattle problem. Housing costs have gone up around the State. While some of this is due to income growth, the question shouldn't be whether smart growth schemes are the sole cause of unaffordable housing.

One of the primary purposes of the GMA is to promote affordable housing. So if urban growth boundaries are contributing to increased housing costs, then there's reason to question whether such a law should've been adopted in the first place.

Three major studies show that the GMA has contributed to the decrease of affordable housing in Washington. Two of these studies were conducted by the Washington State University's Center for Real Estate Research. The first study found a significant 35.5 percent increase in residential lot prices market-wide resulting from the implementation of the growth management act in Clark County. A similar 38.7 percent increase is shown for residential lots located within the urban growth area.

The second study, also by the institute, in Clark County looked specifically at housing affordability instead of at lot price. This study examined 12 quarters prior to and subsequent to GMA implementation. It controlled for many external factors, as did the price index used in the study. The central finding was: The study reveals a 15.97 percent adverse real price, resale home affordability effect in Clark County as of the end of 1997.

This means that a typical resale home sold for $19,749 more than it would have in 1997 absent the measured GMA effect, and that's in 1992 dollars.

Finally, the most recent and comprehensive study was issued in December 2001 by the Reason Public Policy Institute. This extensive study made several findings, but the conclusion was that as much as 26 percent of the housing-price increases at the county level in Washington State may be attributed to the GMA. Overall, the GMA slowed progress in increased housing affordability statewide by as much as 5.1 percent, since housing prices increased at a faster rate than income during the period. The results suggest that population density has an important impact on housing prices as well. Thus, policies that encourage more compact development may contribute to a decline in affordable housing rather than an increase.

The cause is simple: Decrease the supply of buildable land, yet maintain or increase the demand for housing, and costs go up. Add to that factors such as increased process costs and impact fees, and you can see how it's ironic that smart growth leads to a decrease in the supply of affordable housing.

Finally, I would like speak about the rural economic shift in Washington. Economic development in Washington's rural areas has come to a virtual standstill. And as the agriculture-based economies of such rural areas have suffered over the past few years, local communities have not been able to turn to other industries for jobs because of the development restrictions contained in the State's smart growth statutes.

This has caused a shift of wealth from rural areas to urban areas. If we look at data from the Northwest Income Indicators Project from the implementation of GMA, we find that virtually all economic indicators as a percentage of the statewide totals or as a percentage of statewide averages have been falling in eastern Washington rural counties and rising in western Washington metropolitan counties.

The Republican members of the Washington State House of Representatives did not believe that a Republican Administration could be party to encouraging these destructive policies. This is why the Republican Caucus sent a letter to HUD Secretary Martinez urging HUD to reject the guidebook.

We urge you, the Members of the House, to reject any funding requests to assist State and local governments in implementing the APA's legislative guidebook. Thank you very much.

[The prepared statement of Mr. Hymans follows:]

PREPARED STATEMENT OF GEOFFREY WILLIAM HYMANS

My name is Geoffrey William Hymans. I am Senior Counsel to the Republican Caucus of the Washington State House of Representatives. My principal duties include advising the caucus on land use and transportation issues. Prior to joining the legislature, I was an attorney with the large Seattle-based law firm of Williams, Kastner, and Gibbs, specializing in land use issues. In Washington State this means specializing in the deceptively named Growth Management Act and the local comprehensive plans and development regulations adopted under the act.

I come before you today on behalf of the citizens, businesspeople, and property owners of Washington State to express serious concerns regarding the American Planning Association (APA) Legislative Guidebook (Guidebook), and to urge you to deny any funding to state and local governments to implement the misguided schemes contained within the HUD/APA Guidebook.

The State of Washington has had ten years of experience under a state-mandated "growth management" regime. The results of this experiment have been dramatic:

1) increased congestion in our urban areas;
2) increased housing costs, particularly in our urban areas;
3) decreased economic development in our rural areas ;
4) a shift in development and prosperity from the rural parts of the state to the urban areas;
5) an ever-increasing amount of regulation by both the state and local governments, not to mention the huge expenditures required by such regulation.

The state of Washington has had twelve years of experience with "smartgrowth" and "growth management" regimes. Next to the states of Oregon and Florida, Washington has the longest experience with these land use controls in the nation. And, unfortunately, Washington's version of growth management ranks second only to Oregon in terms of the restrictive nature of its state-mandated land use controls.

Washington first adopted the Growth Management Act, or "GMA" for short, in 1990. Although Washington state had been growing at a fairly robust pace, adding roughly a million people during the 1970s and 700,000 during the 1980s, the growth rate was still roughly linear. The precipitating act for the adoption of the Growth Management Act was the filing of Initiative 547, which proposed highly restrictive growth controls.

Washington is an initiative state, as are all West Coast states. The people can propose legislation by collecting a qualifying number of signatures, at which point the initiative is placed on the ballot. According to the "old hands" at the Washington state legislature, this ballot initiative spurred a group of urban legislators to "do something" about "controlling growth" in Washington. The legislature passed SHB 2929 on July 1, 1990. Ironically, in November of that same year the voters rejected Initiative 547 by a vote of 986,505 to 327,339—a 3 to 1 margin.

In July of 1991, Washington state passed the second half of the GMA, ESHB 1025. While the act has been amended virtually every year since, it has remained substantially similar to its 1991 provisions.

If I were to give you a detailed explanation of everything the act does, I would be testifying till next Thursday. And since Washington's legislative session ends next week, I am needed at home. But I will give you a very quick overview of the provisions of the act, with the hope that these highlights demonstrate the high costs, the increase in state government control over traditionally local processes, and the potential for misuse of the expanded planning and permitting processes that have accompanied the GMA in Washington.

There are thirteen planning goals in the GMA. These include promoting affordable housing, encouraging efficient transportation systems, encouraging development in urban areas, encouraging economic development, protecting natural resources, and ensuring that public facilities are in place to serve development. In the abstract, no one could disagree with the goals of the act. But the implementation scheme is drastically flawed.

Counties and cities within counties that reach certain thresholds in either population or population growth are required to adopt comprehensive plans consistent with the state act, and to adopt development regulations (such as zoning, subdivi-

sion, critical areas and concurrency ordinances) consistent with their comprehensive plans. Twenty-nine of Washington's 39 counties, containing 95% of the state's population, currently meet these requirements and plan under the act.

Counties planning under GMA must adopt Urban Growth Areas (UGAs) and Urban Growth Boundaries (UGBs). These areas are supposed to be sufficient to accommodate projected population growth for 20 years. Outside these boundaries, "urban" levels of growth—which are only vaguely defined by the state act as growth requiring "urban services" and at undefined "urban densities"—are banned. These density levels have been set by the Growth Management Hearings Boards. For example, one board set the "bright line" density at one house per five acres. This means that on one side of the UGB zoning of one house every 4 acres is considered too "urban," while on the other side zoning of one house every 5 acres is considered too "rural."

Unelected state Growth Management Hearings Boards, and there are three serving separate geographic areas in Washington, hear appeals and decide whether the local plans and development regulations are "consistent" with the GMA. These growth boards, in addition to deciding the density question discussed above, have ordered municipalities to redraw their urban growth boundaries, have ordered increased "no-touch" buffers around certain fish-bearing streams to be set in place by local governments, and have limited the kinds of businesses that can locate in areas that have been designated as "rural." Further, these growth boards have given great deference to state agency "guidance" documents and state "model" growth management ordinances, leading to *de facto* state control over local decisions even when the act itself was designed to work from the bottom-up.

The GMA is, in the parlance of the APA's legislative guidebook, both vertically and horizontally integrated. Local plans must conform to the state act, and local plans must conform to the plans of adjoining municipalities. County-wide planning policies (CWPPs) trump local plans where they conflict. And while this mandated coordination can result in an easier time locating essential facilities, it also can result in rather harsh top-down planning decisions. Just last year Washington was on the verge of a revolt by many counties when sex-predator transition and housing facilities were declared essential public facilities and the state planned to force counties to allocate such housing on an equal basis among themselves and their cities, using the CWPP process.

All of these regulations—on both the state and local levels—breed further regulations. A perfect example of this is "concurrency" requirements, currently contained in Washington's GMA with regards to transportation facilities and recommended in the APA Legislative Guidebook for most infrastructure. These prescriptions require local governments to deny development where local facilities do not meet some predetermined "level of service." However, it is precisely the "density" requirements embodied by these so-called "smartgrowth" policies that create the congestion in the first place (which will be further discussed below). The answer by state and local governments? Further regulation, such as "transportation demand management" ordinances and mandated "transit-oriented development," development moratoriums, and making development contingent on the payment of huge "impact" fees exacted to expand roads overburdened by the increased density. An ever increasing cycle of control over individual's use of their property, without a hint of compensation provided to affected landowners.

These planning requirements, local legislative implementation, administrative appeals, and agency programs and assistance have not been cheap. By way of example, Jefferson County, a small county of 25,000 population, has spent $3 million (and counting) on its GMA implementation. The amount spent statewide at both the state and local level is easily in the high tens of millions, and probably in the low hundreds of millions. If Congress is considering grants to implement these policies nationwide, it will not be cheap.

And this doesn't even count the costs to private citizens. The increased costs to move a business which is now nonconforming, the increased housing costs which will be discussed below, the increased costs from urban congestion worsened by increased densities, the increased process costs, and the increased costs associated with multiple land use appeals made possible by the redundant levels of planning and implementation.

Here is one example from my own personal experience when I was a land use lawyer in private practice. An individual wanted to rezone property that was across the street from dense residential (apartments) to put up his own apartment building. Bordering the back of his property was single-home residential. This is the classic case where a local government balances the community interests and makes a decision. Given the discretion granted to local governments, these cases prior to GMA

usually involved one appeal from the administrative decision to superior court, and that was it.

Now though, it is far more complex, with more avenues for parties opposed to the project to appeal. Because the zoning, or development regulation, must match the comprehensive plan, you need to get both a zoning change and a comprehensive plan change. The latter is not cheap, as one must hire consultants to demonstrate how the proposed change fits within the comprehensive plan and the act. While these are often processed together by the local government, the comprehensive plan change can be appealed to a growth management hearings board. That board will determine if the change complied with the act. This decision can be appealed on up through the court system. Meanwhile, this delay increases the carrying costs of the project. Finally, after the comprehensive plan amendment is approved, and if the development regulation is found to be consistent with the comprehensive plan, you can start to apply for the permits to actually build the project under the new land use scheme. Which can generate a whole new round of appeals. A simple project like this one can easily cost $20,000 dollars in legal fees, plus fees to planning consultants, traffic engineers (if traffic considerations play a part of the plan), etc. These costs put such projects out of the reach of mom-and-pop developers, leaving the housing market dominated by big developers who can afford to play this game. Of course, fans of the status quo, including no-growth groups, radical environmentalists who oppose development, and local "NIMBY" groups of concerned neighbors, are given far more avenues by which to oppose development.

Did Washington need this act? Certainly not. In 1990, the year GMA was adopted, just over 3% of Washington's land was used for housing, industrial, and commercial purposes—broadly classified as "urban" purposes. 37.5% of Washington's land was in agricultural production. This meant that 40.5% of Washington's land was in "human use." Therefore, almost 60% of the land in Washington is still open space, largely owned by the federal government as national forest land, national parks, and other federal facilities. In 1990, before the GMA was adopted, 82.9% of Washington's citizens lived in a metropolitan area. In 1996, after GMA had been fully implemented in most counties, 82.8% lived inside urban areas. And while completely updated figures aren't yet available from the 2000 census, a current map of the "urban growth areas" in Washington produced by a state agency clearly shows how little of Washington is still "developed." (Attached.)

Congestion:

The Puget Sound region in Washington has developed some of the worst congestion in the country over the past ten years, the time period coinciding with Washington's growth management scheme. By now, a large body of research shows that growth management schemes, particularly those that use "urban growth boundaries" and related methods to increase density, also increase congestion.

This is not really surprising. We start with the fact that Washington, like many states around the nation, has almost reached a saturation point with almost one registered vehicle per licensed driver in the state. Therefore, the simple math of congestion goes like this: if you double density within a certain geographic area, but don't either double road capacity or have a large shift from low capacity vehicles (such as single-occupant cars) to high capacity vehicles (such as buses), you will double congestion on the roads in that area.

Planning to increase congestion is also not surprising, since the same folks who advocate for growth controls usually advocate for "multimodal"—read transit—forms of transportation. The only problem is that the public won't go along.

Even in the most dense urban areas of Washington around Seattle and Tacoma, transit usage fluctuates, depending on what figures you look at, between 10–30%. This means that 70–90% of those new people you have placed into a more dense area are going to be driving their single-occupancy vehicles on the roads. It is not surprising that congestion keeps increasing.

Further, the public won't go along with the density scheme in another way that contributes to congestion. The American dream is to live in a single-family home with a bit of property. Far more of Washington's citizens have voted with their pocketbooks for this lifestyle over living in apartments and condos inside urban areas. But if we are rezoning areas for increased density, and the public doesn't want to live in these dense neighborhoods, then the public is willing to drive longer distances to commute between home and work. Their home conditions have, so far, outweighed the burdens of increased commute times (which have not increased by a huge margin anyway, according to Texas Transportation Institute and census data). So if more folks are driving between urban areas that contain their job sites because they don't want to live in the dense neighborhoods that surround these areas, yet

aren't allowed to develop housing in the "rural" areas that separate the urban islands, you have yet another prescription for increased congestion.

Planners have an answer for this. Make the commute and the congestion so bad that folks will be forced to get out of their cars and take transit. Portland planners have admitted as much, but short of very coercive transportation and land use policies this simply won't work.

One of the best papers on this is by Genevieve Giuliano of the USC School of Policy, Planning, and Development. In "Land Use Policy and Transportation: Why we won't get there from here," Professor Giuliano concludes that only drastic measures would actually decrease auto usage. Can any of you see adding a few dollars gas tax as politically viable? What about banning single-occupant auto use in urban areas?

In Washington, we have already adopted "transportation demand management programs" such as HOV (high occupancy vehicle) lanes, commute trip reduction programs mandating that large employers provide incentives for their employees not to commute by single-occupancy car, and intelligent traffic control measures—not to mention already having a very extensive transit system available.

Most people still drive solo. And the more dense you make an urban area, the more folks will want to use the limited road space. Unless there is a massive road infrastructure investment in dollar amounts that will dwarf even the expensive smartgrowth implementation costs discussed above, adopting these density-promoting policies guarantees more congested roads.

Lack of Affordable Housing

At the same time we have increased congestion, housing prices in the Puget Sound region have skyrocketed, in large part due to the limitations on supply that have accompanied growth management.

Seattle has been almost as famous for the past decade for its high cost of housing as for its congested roads. But this is not only a Seattle problem. Housing costs have been driven up state wide. While a lot of this is due to income growth, the question shouldn't be whether smartgrowth schemes are the sole cause of unaffordable housing. One of the primary purposes of the GMA is to promote *affordable* housing, so if urban growth boundaries are contributing to increased housing costs then there is reason to question whether such laws should have been adopted in the first place.

Between 1990 and 2000 the median house price in Washington increased by 41.6% placing Washington 46th out of 50 states in terms of the change in affordability. A different measure, comparing the ratio of the median house price to median income, placed Washington 49th out of 51 (including DC) in terms of the change in affordability represented by the change in this ratio from 1990 to 2000.

While there have been relatively few studies that have looked at the contribution of growth management to decreased housing affordability, those that have have established a clear connection. And if we remember that the GMA has only been fully implemented for the past 6–8 years in the largest counties, and less than that in some smaller counties, we can continue to track the data to confirm the early findings.

Two of the Washington studies were conducted by the Washington State University's Center for Real Estate Research. The first study, from March 28, 1997, was titled "Urban Growth Boundaries and Lot Price." This study examined the urban Clark County in southwest Washington. It found "a significant 35.5% increase in residential lot prices market-wide resulting from implementation of the Growth Management Act in Clark County. A similar 38.7% increase is shown for residential lots located within the urban growth area." (Wolveton, Purdie, and Crellin, pg. 9.) This data is very significant, as the imposition of the Clark County UGB represented the "closing" of the Portland metropolitan area, thereby giving a unique window into what happens when a formerly open pressure valve for growth shuts.

A second study of Clark County by the Center (Wolverton/Wolff 2001) looked specifically at Housing Affordability instead of at lot price. This study examined 12 quarters prior and subsequent to GMA implementation. It controlled for factors such as excess supply, construction costs, population growth, interest rates, and seasonal factors. The price index used in the study controlled for distance from the Vancouver central business district, distance to freeway interchange, bedroom and bathroom count, home age, lot size, outbuilding size, fireplaces, garage, central air conditioning, and home quality. The central finding was:

> "the study reveals a 15.97% adverse real price, resale home affordability effect in Clark County as of the end of 1997. This means that the typical resale home sold for $19,749 more than it would have in 1997 absent the measured GMA effect (measured in 1992 dollars.)"

Finally, the most recent, and comprehensive, study was issued in December, 2001by the Reason Public Policy Institute. This extensive study made several findings, but the conclusion was that:

> "as much as 26 percent of the housing-price increases at the county level in Washington State may be attributed to the GMA. Overall, the GMA slowed progress in increased housing affordability statewide by as much as 5.1 percent, since housing prices increased at a faster rate than income during this period. The results suggest that population density has an important impact on housing prices as well. Thus, policies that encourage more compact development may contribute to a decline in housing affordability rather than an increase."

The cause of this are simple. Decrease the supply of buildable land, yet maintain or increase the demand for housing, and the cost will go up. Add to that factors such as increased process costs cited above and impact fees tacked on to housing prices stemming from concurrency requirements of the GMA, and one can quickly see how "smartgrowth" schemes can lead, ironically, to decreasing the supply of affordable housing.

This has some very interesting unintended consequences. As Matthew E. Kahn of Tufts University noted in his paper, "Does Sprawl reduce the Black/White Housing Consumption Gap," (Housing Policy Debate, Volume 12, Issue 1, Fannie Mae Foundation 2001), decreased housing affordability hinders the reduction of the black/white housing consumption gap, which has been steadily closing for 80 years.

What is the solution to this "smartgrowth" affordable housing dilemma? Well, the smart thing to do might be to open up the market by increasing the supply of buildable lands for housing, and removing land use controls to let local jurisdictions incorporate densities according to their needs. One could even imagine tax incentives for the development of low-income and affordable housing. But unfortunately, too many "smartgrowth" supporters in Washington would rather see direct subsidies to allow folks to live in areas that are otherwise unaffordable under the GMA. Of course, where do these subsidies come from? They are taxpayer dollars, taken by government to solve a problem created by government land use control mandates in the first place.

Rural-Urban Economic Shift

Finally, economic development in Washington's rural areas has come to a virtual standstill. As the agriculture-based economies of such rural areas have suffered over the past few years, local communities have not been able to turn to other industries for jobs because of the development restrictions contained in the state's "smartgrowth" statutes. This has caused a shift in wealth from the rural areas of Washington to urban areas. And since more of these urban areas are located in Western Washington than in Eastern Washington (convenient shorthand for the split along the Cascade mountains), this wealth shift is moving West.

If we look at data from the Northwest Income Indicators Project at Washington State University from the implementation of the GMA on the county level (roughly 1995), we find that virtually all economic indicators as a percentage of the statewide totals or as percentage of statewide averages have been falling in Eastern Washington counties and in nonmetropolitan Western Washington counties, but rising in Western Washington Metropolitan counties. This is true for employment, total industry earnings, average earnings per job, personal income, and per capita income. For now, all that we can note is the correlation between these economic measures and the implementation of GMA. But this wealth and opportunity shift deserves further exploration. It is exactly what one would expect when it is easier to develop in areas that are already much more urbanized, and therefore offer more development opportunities than areas that are largely rural, where urban growth boundaries will be more restrictive and opportunities to develop more limited.

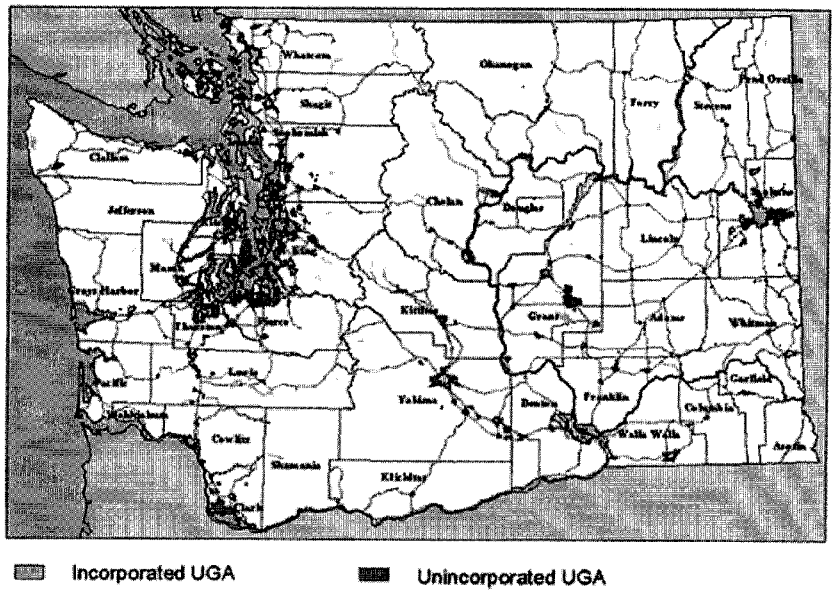
Summary:

The Republican members of the Washington State House of Representatives did not believe that a Republican administration could be party to encouraging these destructive policies to be adopted by other states and local governments. This is why the Republican Caucus of the Washington State House of Representatives sent a letter to HUD Secretary Martinez urging HUD to reject the Guidebook.

It is not hard to fathom the APA's interest in pursuing this guidebook. The APA will expand its membership as the number of planners expands exponentially with the implementation of this "smartgrowth" scheme. Further, under these very restrictive proposed local and state laws, the power of those who make a living by "planning" the lives of citizens will also radically increase.

For the most part, these planners are unelected, as are the state bureaucrats who oversee these "smartgrowth" programs. Such programs, when instituted, therefore constitute a massive shift of responsibility and accountability from the people and their elected local officials to labyrinth planning departments and state agencies.

We in Washington have lived with this nightmare for ten years, and despite bipartisan legislative efforts, two democratic Governors from the state's most heavily urbanized area, Seattle, have vetoed reasonable reforms to Washington's Growth Management Act. However, we would urge you, the members of the House, to avoid assisting those dedicated to increasing government's scope, and their planning association and radical environmentalist allies, in spreading this "smartgrowth" disease across the country. We urge you to reject any funding requests to assist state and local governments in implementing the APA's Legislative Guidebook. If the House is interested in addressing state and local planning methods, it should begin an inclusive process in which all interested parties might participate to develop a national consensus on this issue.



Mr. CHABOT. Thank you, Mr. Hymans. You tricked me; you said "finally," and I thought you were wrapping up, and then you said "finally" a second time. [Laughter.]

Mr. HYMANS. That's an old trick from the Washington Statehouse.

Mr. CHABOT. Okay.

At this point, the Members who are present here have 5 minutes to ask questions of the panel members. I'll begin with myself.

My first questions I would address to all of the panel members and anybody who would like to take a shot at it is welcome to do so. And if there's no objection, Mr. Meck is able to answer as well.

Do any of you have any concerns about an executive branch agency contracting out to interested parties the drafting of proposed legislation, which if not objected to by the agency, becomes official government work product? Do you think that amounts to a sort of compounded delegation doctrine in which Congress delegates to executive branch agencies, then those agencies delegate to

interested private parties? And if so, does that concern any of you or not concern? And anybody who wants to take a shot at it—Mr. Manley?

Mr. MANLEY. Mr. Chairman, we have a model for that with the NIH. The NIH contracts out to universities on a regular basis to do research in the biomedical fields, and the research investigators publish their results. And the government does not assume responsibility for that.

And the same thing is true here. Mr. Meck and his team did research, and they're publishing an encyclopedic document to help local government decision-makers make better informed decisions.

And what is more, that's the same—the same thing that was done here was done by Mr. Hoover when he was Secretary of Commerce back in the Twenties. And Alfred Bettman from Cincinnati was a principal draftsman in these old enabling statutes. And unfortunately, he made the assumption that the whole world was like Cincinnati, and he drafted it that way. And that's one of the reasons we're in this problem, and we haven't thought about it since then.

Mr. CHABOT. I think we'd both agree, it's too bad the whole world isn't like Cincinnati; right, Mr. Manley? [Laughter.]

Mr. MANLEY. Absolutely. I'm a Cincinnati nationalist.

Mr. CHABOT. Absolutely.

Mr. Claus?

Mr. CLAUS. We have an acute concern with just exactly that. There are a number of reasons.

First, APA has an established history on what they take on the issues, whether they comply with the Federal court decisions or not.

Secondarily, there has been a deliberate part on the HUD staff to withhold input, and we will supply you information on that. What happened is, this was an agenda-driven proposal that, if you look at it, was aimed at promoting jobs for identifiable people to the exclusion of other people. And any time you do not put a disclaimer in, then this gets out to the local governments with their granting powers that the Federal Government has—they're going misconstrue this as Federal policy.

And if you look at the acknowledgements, they mislead you. Look at Bender's acknowledgements in their legal series; they mislead you. Look at the links on FEMA, HUD, and EPA's Web sites, and they mislead you. You would literally believe this is Federal policy when, take something like the 1970 Rehabilitation Removal Act; in spite of Mr. Manley's suggestion there is a menu, there isn't. It is biased to one side. The menu doesn't give the other side like just compensation.

The most innovative program created in wetlands restoration was created by this Congress around buying easements. And the key was appraising land and then paying just compensation for taking those uses, which, in effect, is zoning. That was never even mentioned. What happens when you get documents by agenda-driven organization—without that clear separation, we will fight this over and over and be told it's Federal policy.

Mr. CHABOT. Thank you.

I've only got 1 minute left, unfortunately. So I'd like to go to my next question, if I could.

Mr. Alford, what, if any, impact do you believe that this would have on minority businesses?

Mr. ALFORD. I think it would be devastating. I gave a good example of San Francisco. I think we would have more Fillmore districts happening throughout this country.

In my written testimony, I talked about the interstate system, when it was built in the '50's and '60's, how they ripped open black business districts in the urban areas. You look at I-65, you look at 395 here, you look at the Dan Ryan Expressway—they just ripped through urban communities and the business districts scattered with no recourse and basically destroyed those business operations, destroyed the black middle-class.

And within the next decade, we started having urban blight, for some reason. And that's one of the main ingredients, was the poor planning of the interstate system.

I see this as replicating the same thing.

Mr. CHABOT. Thank you very much. I've only got 10 seconds left on the clock here, and I wouldn't even get the question out, so I'll yield back the balance of my time. And I'll turn now to the gentlelady from Pennsylvania.

Ms. HART. If you'd like, I could yield you some of my time, Mr. Chairman.

Mr. CHABOT. If you have any left, that would be great.

Ms. HART. Okay. I'll do that, but I just want to ask one quick question.

I was a State senator for 10 years and believe it is appropriate to have the zoning-type decisions made on the local level. I'm assuming that every State does that. And if anybody on the panel has any reason to disagree with that statement, I need to hear it, especially from Washington State.

Mr. HYMANS. The way Washington State works is we have a mandated—we have a State statute called the Growth Management Act, which mandates certain things be included in every local government's comprehensive plan. Then we have an unelected hearing board, called the Growth Management Hearing Board. This hearing board, because the State act is so vague—you know, it requires that urban growth not occur outside the urban growth boundary, but it doesn't define what urban growth is.

So we have this unelected State hearing board that makes those decisions for the State. And so those decisions, while many of the smart growth advocates claim this is a bottom-up system, because of the operation of the hearings board, it is a State-oriented top-down system when you get into the details of the act.

Ms. HART. So if your local governments make a determination about their plan, there's always somebody at the State level who can basically tear it apart.

Mr. HYMANS. There's an activist—a hard-core activist culture out there that is willing to appeal any local government decision that they disagree with, and those are usually growth-oriented decisions, to these growth hearing boards, which then tend to reverse the local governments.

Ms. HART. Okay. Mr. Meck?

Mr. MECK. I happen to agree with his assessment of the hearing boards. The hearing boards are a serious flaw in the Washington system, which is why we didn't include them in the legislative guidebook.

In essence, what the hearing boards are doing in Washington State is making policy on an ad hoc basis. And the problems that he identifies are problems. And unfortunately, the system has resisted efforts to reform it.

Our guidebook, as I said, does not recommend a system in that respect to provide for hearing boards.

I will say, though, that one of the things we did embrace from Washington State that appears in chapter 10 of the legislative guidebook—I don't know if you have it. It's about the size of, you know, a construction block. But——

Ms. HART. I——

Mr. MECK. Okay.

Washington State has an excellent law on—or, judicial review of land use decisions, and we felt it was the best such law in the Nation. And so the mechanism that we established in the legislative guidebook to deal with disputes over land use issues, apart from the growth management hearing board that is in court, we drew from Washington State. It's a first-rate statute.

Ms. HART. Thanks.

Mr. Claus, I believe you had a comment.

Mr. CLAUS. Yes. Well, first of all, obviously, all of us support local decisions, but that is not really as much of the issue we object with as—first of all, my first case was *Metromedia* v. *San Diego*, that ended up at the Supreme Court. Current Solicitor General Ted Olson was on the winning side; I was working for the losing side.

And what happened is, in no surprise to most of us who have some sense of the Constitution, we lost because of first amendment intrusion. It was a free speech issue. It wasn't a fifth or a 14th.

And then the result was, we ended up paying—the City of San Diego ended up paying court costs. We had no justification for doing what we had done. It was what you called rational relationships. We specified, we're doing this for the following reasons. They were not true. And as a result, we paid for the litigation.

What has happened, in these extremely intrusive cases, where you're intruding and allowing neighbors now to intrude, the courts have come in and put a burden of intermediate to strict scrutiny on the State.

And it is only fair that people drafting a book explain that when you start manipulating civil rights, and you've gone far, far beyond property rights, and you're destroying businesses, you take an adult responsibility as outlined in FEMA and outlined in the Uniform Standards of Appraisal Practice.

That side of the menu, I am sorry, is not in the legislative guidebook. It is simply as if you've gone in to say let's liberalize the State's powers without giving them any responsibility.

And we encourage the Federal courts to keep doing what they're doing, because it's what makes land use planning livable, workable, and leaving some our basic rights to our homes intact.

I had the amortization phrase recommended in the legislative guidebook on my home, and I could not get a loan until the city realized what it did. It destroys your ability.

And the lower income, particularly minorities in this, inevitably end up with these nonconforming zones that the planners next time will get it right.

Ms. HART. So it's not only invasive, it's extremely burdensome.

Mr. CLAUS. It's burdensome in every sense.

Ms. HART. Thank you.

I yield back, Mr. Chairman.

Mr. CHABOT. I thank the gentlelady for yielding. I'm going to yield myself, by unanimous consent, an additional 2 minutes to just ask one final question about the review process on the project, and I'll direct the question either to Mr. Manley or Mr. Meck, and then any of the other gentlemen that would like to respond.

Relative to requests for outside parties to submit information or have input in the project, what was the procedure that was followed? And I'd be interested to know what sort of concerns the other panel members might have had about that process, how it was carried out.

Mr. MECK. You want me to respond?

Mr. CHABOT. Yes. Either you or Mr. Manley.

Mr. MECK. I'd be happy to.

At the outset of the project—the project actually began in 1994. We sent out questionnaires to a group of about 150 to 160 associations, and about 50 or 60 of them responded, with varying degrees of interest. In some cases, we had people who were willing to write working papers for us to suggest different strategies. In other cases, we had people who simply wanted to review our newsletter.

We also created a directorate, and advisory committee—this was, by the way, at HUD's recommendation—that consisted—I would not call them the regulated community. I would call them associations of local government officials. So we had the representatives from the National League of Cities, the U.S. Conference of Mayors, the National Association of Towns and Townships, the National Association of Regional Councils. And they served as our sounding board for the legislative guidebook.

As we developed individual drafts of the model legislation and commentary, people would give us comments. And in the last phase of the project, as we indicated in Mr. Manley's testimony, we got approximately 320 to 330 single-spaced pages of comments, a lot of them from, for example, from the National Association of Homebuilders. In Mr. Claus' testimony, there's a letter that was sent to us.

In each case—in each case—we responded in writing in a series of highly detailed memos, which we'd be happy to provide the Committee. And in about 85 percent of the cases, we made changes based on them, because people—we felt if people took the time to read this stuff—and, you know, zoning law ain't that exciting—we were going to respond to it.

And we—what this process did, in my opinion, is identify for us options that we would normally have not thought of by ourselves.

Mr. CHABOT. Thank you.

Would the other gentlemen like to respond? Mr. Claus? Mr. Hymans?

Mr. CLAUS. Well, I mean, first of all, let's go back to what the legislative guidebook is. It's an agenda-driven manuscript written by APA with them having the final, total editorial rights. And if you look at the list of authors they cite, they're either in lockstep with their agenda or they're not included.

So aside from the fact that there really never was any kind of public hearing, they excluded people's testimony and picked and choose as it went.

And in our case, we had two specific people contact the research director, Mr. William Klein, and I will put a memo in here, asking him, does this legislative guidebook impact on us, and he said no. Now, that pretty well stops the comment.

The problem is that when I went to David Engel at HUD and there is—I'm pushing on this issue. I was told I was not welcome to comment. Now, as you can guess, I'm not particularly a favorite of APA, but be that as it may, it seems like to me, if they were going to manipulate my property rights and my civil rights, I should have been able to comment. I shouldn't been misled. And we were misled.

Mr. CHABOT. Thank you.

Mr. Hymans?

Mr. HYMANS. I just wanted to point out—and I don't have it in front of me. I was trying to find it. But if I remember from looking at the list of folks that were consulted, I don't believe any national property rights organizations were consulted. However, national environmental groups were.

And in Washington, we come a lot into the arena where we have hard-core idealists on one side and business on the other. And businesses are always willing to go along to get along. But unless you address the hard-core idealists on both sides, you never get a complete picture.

And while I notice—he can correct me—Stuart can correct me, if I'm wrong, but I do believe that several national environmental groups were directly consulted, but I'm not sure if any national property rights organizations were.

Mr. MECK. Actually, I could respond. We did send out the—one of the questionnaires we sent out was responded to by the Pacific Legal Foundation, and they were on our newsletter mailing list. We did separate briefings for the National Association of Realtors. I went to the National Association of Homebuilders legislative policy conference myself. We met with the National Multifamily Housing Association. Mr. Claus, who is sitting next to me, receives our research highlights, which described in great detail what we were doing.

So, we weren't keeping this under, you know, a bushel. All this material was on our Web site. And we had a newsletter mailing list of about 800 people. And every time somebody asked us for something, we sent it to them and kept logs of who we sent materials to and provided them to HUD under our cooperative agreement.

Mr. CHABOT. Thank you.

Mr. Alford?

Mr. ALFORD. Mr. Chairman, there's a perception—in fact, a paranoia, in the African-American community that a lot of these decisions are done with discriminatory intent. And it probably is not the case, but when African-American entities are not included in the decision-making, if they're not at the table when the cards are dealt, you're going to have effects that exclude their best interests—and hence, the paranoia.

Mr. CHABOT. Thank you.

Mr. MECK. I'd like to respond. We had four African-Americans who sat on our directorate, representing national organizations. And I can identify them by name, if you'd like me to.

Mr. CHABOT. If you'd like to.

Mr. MECK. Karen Jackson Sims; Haron Battle; Eugene Lowe from the U.S. Conference of Mayors; and Ben Brown, who was involved with the International Municipal Law Officers Association. So we did have minorities on our directorate who were involved very—in a very engaged way in reviewing this material. So there was no discriminatory intent. Anybody who wanted to comment or involve themselves in the review of the guidebook, we were happy to hear them. And we did hear from them.

Mr. CHABOT. Mr. Alford?

Mr. ALFORD. I would like to know, were there any minority organizations that were represented, not just someone who is of color? National Black Mayors Conference, were they represented? Urban League? NAACP?

Mr. MECK. We set up the directorate under the guidelines that HUD asked us to do it. And if HUD had wanted that, we would have been happy to accommodate them. But this is 7 years later.

Mr. CHABOT. But the answer is no to the question.

Mr. MECK. The answer is no, right.

Mr. CHABOT. Okay.

Mr. MECK. Predominantly, the organizations that we had on the directorate were organizations of elected officials. HUD felt that it was important to have elected official organizations on the directorate, because they represented the elected will of the people.

Mr. CHABOT. Okay.

I thank the panel very much for their testimony this afternoon. I think you've added a significant amount to this topic.

I apologize for there not being more Members here this afternoon, but, unfortunately, we had our last vote. As you know, this hearing was actually earlier and then another Committee went longer, and that's the Committee above this Committee, so we deferred. And so that's why we're a little bit late, and that's why there aren't more Members here. I apologize for that.

But this will all be part of the record, and hopefully most of the Members will take the time to review this testimony. So we appreciate your time.

Without objection, Members may submit additional materials for inclusion in the hearing record, and they may also submit questions for the witnesses within seven legislative days. So you may well be getting some written questions, and we'd ask you to respond in a reasonable amount of time to those.

If there's no further business to come before the Committee, we are adjourned.

[Whereupon, at 2:01 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE STEVE CHABOT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

The "Growing Smart Legislative Guidebook" is a collection of commentary and proposed state legislation that would comprehensively revise the nation's land use planning laws. It is the result of a seven year effort by the Department of Housing and Urban Development using $2 million of the taxpayers money.

Under the contract between HUD and the American Planning Association, the Guidebook is considered official federal government work product. The contract states that HUD could have disapproved the Guidebook if its methodology or analysis were found faulty, but HUD did not so disapprove. HUD also did not exercise its right to have dissenting views attached to the Guidebook addressing disagreement with the proposed legislative solutions or to point out errors in the methodology on which any of the Guidebook's conclusions are based.

Many in the regulated community—including those in the landowning, agricultural, minority, small business, and manufacturing communities—have vociferously objected to the proposals contained in the Guidebook. Organizations signing letters expressing their concerns regarding the Guidebook include the National Black Chamber of Commerce, the Small Business Survival Committee, the Islamic Institute, the Chamber of Commerce, and the National Association of Manufacturers. Such organizations point out that only one representative of the *regulated* community—compared to 29 other representatives representing the *regulating* community—was allowed to serve on the "Directorate" that engaged in the official deliberations that resulted in the Guidebook. Consequently, they argue that their lack of representation during the seven year project is a fundamental methodological error that taints the Guidebook's proposals and conclusions, and for that reason alone HUD should have delayed its approval of the Guidebook or at least insisted on its right to include dissenting views.

In exercising its oversight role, Congress should be especially vigilant when the executive branch contracts out to potentially interested parties the job of drafting legislative proposals. Our hearing today provides an opportunity for Members to hear the concerns of those who were not represented during deliberations on the Guidebook, but who will be severely impacted by many of its proposed provisions should they become law.

Many of these provisions may well result in disparate racial impacts and unreasonably burden property rights. For example, a report by a researcher at the Fletcher School of Law and Diplomacy concluded that "[b]lack households living in sprawled metropolitan areas live in larger housing units and are more likely to own a home than . . . identical black households in less sprawled areas."

Further, many argue that a sound land use planning program should foster decentralized programs that center on local control—rather than centralized programs directed at the state or regional level—because localities should be allowed to use their better understanding of local conditions to provide local citizens with the best available quality of life. Yet under the legislation proposed in the Guidebook, local governments would be required to write plans that follow state goals even if local residents do not agree with those goals and plans. As a former local official—serving in both county and city government—I have serious concerns with this approach.

Finally, the Guidebook expressly authorizes local governments to regulate the "location, period of display, size, height, spacing, movement, and aesthetic features of signs, including the locations at which signs may and may not be placed." These provisions, in part, take aim at on-premise signs that identify a place of business or advertise the product and services available—allowing government, after a period of time, to force the removal of signs from a business. This raises the unsettling,

and possibly unconstitutional, possibility that a small business, who frequently depend on signs for their livelihood, would have no right to tell people that they exist.

I'd like to close by welcoming all our witnesses here today, in particular Robert Manley from Cincinnati. I know from personal experience and from reading Bob's testimony that we both agree on the need to promote development that offers consumer choice, gives families an opportunity to buy their first home at an affordable price, and is consistent with a local communities vision and values.

Bob, it's good to have you here today and as we have the opportunity to hear from some of those who are concerned about the Guidebook's recommendations we'll also be interested to learn more about the Guidebook's drafting process and APA's views.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman, with all due respect I must ask you, why are we here today? When Jack Kemp was Secretary of HUD under the first President Bush, he ordered this study to survey state and local legislative initiatives to update models of land use and planning. Almost $2 million dollars later, the American Planning Association provided HUD with what it asked for—a document that could serve as a resource for communities around the country that are facing challenges of unparalleled, unplanned suburban growth and sprawl, and the descimation of urban centers. This guidebook is exactly that—a guide and survey of what has worked. It is not a law or regulation that communities must follow to the letter. It does not have the force or even the implication of law, and I trust that communities will use it to fashion planning laws that work for them.

The report itself indicates that a multitude of organizations and individuals were consulted and involved over this seven year process. Today you have brought some individuals who are not happy with the report. I guarantee there's not a single report anywhere that someone won't disagree with. But we don't hold a hearing every time someone is unhappy with a report commissioned for a government agency.

I am particularly concerned about the way this issue is being couched as one that will harm the African American community. Assuming that the arguments we will hear from the National Black Chamber of Commerce are true, I see no distinction between the effects of commercial sign regulations on African American businesses and other small and community based businesses. Access to financing is serious problem, however, and it is exacerbated for black businesses by the decline of urban communities caused by sprawl from the city.

African American communities are suffering from the lack of updated urban and suburban planning models. In my home town of Detroit, extensive suburban expansion has provided another vehicle for white flight from the city, but fewer blacks have been able to move to big homes with big yards in the suburbs. Fannie Mae ranked Detroit as the third worst city in the nation for promoting sprawl. Detroit's African American community has become more and more isolated in the urban center without the benefits of housing improvements and options, commercial centers and expanded work opportunities that exist in the suburbs. Furthermore, environmental problems (along with social ones), devalued property and declining tax bases plague black urban communities without much improvement. From brownfields to decayed housing and infrastructure, struggling African Americans are losing out in our cities as money and political attention follow the more affluent people to the suburbs, draining resources from city needs.

I am curious to hear why your guests today think the suggestions in this Guidebook are so damaging to black businesses. I am sure that African American businesses share my deep concerns for the fate of urban communities, which are often the base of their business market.

NAHB
NATIONAL ASSOCIATION OF HOME BUILDERS

LEGISLATIVE AND POLITICAL RELATIONS

Katherine E. Doddridge
Senior Staff Vice President

March 6, 2002

The Honorable Steve Chabot, Chairman
Subcommittee on the Constitution
H2-362 Ford House Office Building
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the 205,000 members of the National Association of Home Builders (NAHB), I am writing in response to your decision to hold an oversight hearing on the American Planning Association's (APA) *Growing Smart Legislative Guidebook* (the *Guidebook*) and its potential impact on private property rights and small business, including minority-owned businesses.

The *APA Growing Smart Legislative Guidebook* is the product of a six-year effort by the APA, with substantial financial support from the Department of Housing and Urban Development, to develop a compendium of proposals, commentary and alternative model statutes that state legislatures can use to update planning enabling legislation. These model statutes have the potential to affect planning and growth management policies at the state and local level for decades.

As you may know, NAHB provided input in the development of the *Guidebook*. Of the fourteen members on the Policy Directorate that advised APA on the *Guidebook*, an NAHB member, Paul S. Barru of Colorado, represented the views of the built environment. Almost all the remaining participants were representatives of public sector groups. While the *Guidebook* contains provisions that could both help and hurt the building industry, most of which are small businesses, on balance, the *Guidebook* shows a bias for top-down, government-led policies and solutions and fails to appreciate the power of the marketplace to shape communities.

I have attached a copy of the dissenting report to the *Guidebook*, which was written by NAHB, for your reference. I look forward to working with you in the coming months to address any concerns you may have about NAHB's role in the development of the *Guidebook*.

Sincerely,

Kathy Doddridge

Katherine E. Doddridge

KED: jt

1201 15th Street, NW • Washington, DC 20005-2800
(202) 822-0470 • (800) 368-5242, ext. 470 • Fax: (202) 861-2135
E-mail: *kdoddridge@nahb.com*

Report of the Member Representing the Built Environment—
Comments and Concerns on the Growing Smart Legislative Guidebook
Submitted by Paul S. Barru

Note: Comments are based on final draft Guidebook language posted on Internet and dated October 26, 2001

PREFACE

As the member of the Growing Smart Directorate representing the "built environment", I speak for the citizens who own land and who, in any proposed use of such land, would be subject to the rules and processes proposed in the Guidebook if adopted by states, regions, counties, or municipalities. I submit this on behalf of the homebuilders, office and industrial developers, real estate agents, general contractors, road builders, engineers, architects, and others who are generally classed as the built environment.

Clearly, I will not presume to comment on the whole of this monumental work, but only briefly on three things: 1) assumptions that either do or should underlay the process; 2) a major disappointment in the Guidebook; and 3) a selected group of specific issues of such major import to the whole enterprise of Smart Growth and its twin, Smart Process, that if not implemented and managed properly, have the potential to undermine much of the value that has been achieved.

ASSUMPTIONS

Smart Growth means planning for growth, not slowing growth or no growth. The Guidebook is successful in reaching its objective of Smart Growth and its twin, Smart Process, in some specific areas. However, on the whole, it falls far short of what might have been achieved. This is hardly a surprise when you consider the current state of growth management and the constant battleground it has become. I feel the process began to come undone as it moved ahead with a broad vision of Smart Growth, because working assumptions and definitions were not constantly revisited to see if they had continuing validity. In the end, the process sought to satisfy two or more visions, often imposed from outside of the staff and Directorate, by presenting alternatives rather than doing the harder job of reaching consensus on a common vision. Alternative choices for managing growth—within a common vision of Smart Growth that means planning for growth as needed, not stopping it—are what is needed to meet the needs of divergent communities.

Any approach to Smart Growth must be comprehensive. This means that it must include concerns for the environment, the economy, and social equity or justice. **These three elements must be balanced.** Like a three-legged stool, if the legs are not the same length, it will not provide a solid base to stand on; and if one leg is too long, the stool will tip over.

The natural environment needs strong protection, but protection comes in many forms. Some lands need to be preserved in public ownership, while others are best protected by environmentally sensitive development. Still other lands are suitable for intense development to allow a community to accommodate its projected development needs. The Guidebook falls short in identifying various types of land that require protection and criteria to judge the best protection techniques. While limited in scope, the Guidebook focuses on limiting development in "sensitive areas" with little guidance on defining what they are and the best ways to protect them.

The absence of an economist on the Directorate or of any significant economic or tax studies is an indication that the economics of Smart Growth were only peripherally addressed. When essential

economic issues began to emerge, there was little willingness to indicate at the very least that they were important and needed to be considered, even if they were not included in any depth within the Guidebook. To deal with the economy seriously, beyond the Guidebook's modest efforts, you must include a consideration of economic development and job generation, especially how they interact in creating land use demand. Other related topics that need to be understood include how taxation policy drives land use decisions, favoring job generation without always addressing the provision of adequate housing to match those jobs; how housing, commercial, and retail markets interact in creating growth pressure; how you plan for, build, and finance infrastructure in a timely and cost-effective manner; among many other items that affect the economy.

In the simplest terms, social equity is concerned with how well people can live in a community on the wages they are able to earn in jobs created by economic development and the degree to which growth benefits all segments of society. The Guidebook gives considerable protection from the adverse consequences of growth but does not adequately address the equity issues inherent in a community's failure to ensure that affordable housing for all income segments is available. The inclusions in the Guidebook are not sufficient.

To judge APA adversely for not having predicted that "comprehensive planning" for Smart Growth included such a broad array of issues is unfair. This is an area of inquiry that grows as the interrelatedness of many issues and their importance to the whole emerges. While it might have been impossible to include all of these within the scope of the original enterprise, the work suffers by not indicating that these gaps exist. I hope that if the Guidebook undergoes revisions in future years, the APA will consider analyzing some of these areas and that broad advisory input from affected interest groups will be incorporated in such revisions. In the meantime, the absence of these issues in this Guidebook compromises its goal of providing pathways for Growing Smart.

Growing Smart requires a blueprint or comprehensive plan that, when adopted, becomes public policy. The process for developing any effective public policy must be inclusive, deliberate, and, to the greatest degree possible, achieved by consensus. It cannot be a top-down process, with public officials and staff driving and controlling the process. Rather, they need to enable the broadest possible community of voices and viewpoints to be heard and to participate. This should also include private sector business people, who are often excluded from the public debates. After all, they are the ones who take many of the risks involved in implementing the growth plan. The goal is to achieve a community vision that balances as many needs and desires of the community as possible. This vision takes tangible form as public policy known as an adopted comprehensive plan. Elected officials then need to legislate the most effective structure for the efficient, timely, and cost-effective implementation of this public policy.

Smart growth requires a smart process to fully implement what the community seeks from its smart growth public policy. When a landowner or any other citizen seeks to use their land or any other outcome in strict conformity to the provisions of the master plan/public policy, they have a right to expect a process that allows only directly and significantly affected parties to participate. Unforeseen and unexpected negative consequences of the proposed implementation need to be dealt with equitably. The benefits to the community and the applicant will be fidelity to the community's growth vision, the elimination of unnecessary risk and time, and significant cost savings to all parties, not the least being for taxpayers/consumers.

A basic philosophical premise of smart growth should be that comprehensive plans be implemented, not nullified in piecemeal fashion through the development review process. Issues settled during the comprehensive plan debate should not be reopened for a period of time following adoption if the plan and the process are to be meaningful.

MAJOR DISAPPOINTMENT

At best, this is a complex document that requires a good deal of knowledge to even begin to use. A solid index is only a partial and incomplete solution. The cross-referencing list now included at the beginning of each chapter is a good start, but to make this work truly useful requires extensive cross-referencing within the text itself, section-by-section, subsection-by-subsection. This is a major but absolutely essential task for effective and complete use.

SPECIFIC ISSUES IN THE GUIDEBOOK

My objections and recommendations relate to the eight most critical areas of concern: standing and reopening of settled issues, supplementation of the record, sanctions on local government for failure to update plans, exhaustion of remedies, moratoria, vested rights, third-party initiated zoning petitions, and designation of critical and sensitive areas.

Standing and Reopening of Settled Issues

After embracing the traditional standard of "aggrievement" as the basis for standing to petition for judicial review of a land use decision (September 2001 Draft of the Guidebook, hereinafter "September 2001 Draft"), the most recent draft (hereinafter, the "October 2001 Draft") inexplicably dilutes the definition of "aggrieved" and adds other options that effectively allow any person with any ax to grind to pursue a court challenge, whether or not he or she will actually suffer any special harm or injury, has appeared at or offered evidence during a public hearing, or even lives in the impacted community. This expansive approach to standing fundamentally alters the system now in place across the nation, which requires a party challenging a land use decision to take part in the approval process and offer comments, to actually live in the community in question, and to demonstrate that the proposed use will cause special injury or harm to them over and above its impact upon the public generally. These liberal standing provisions will increase the amount of litigation that communities will face and it is more likely the government will be sued rather than a developer.

The objectionable provisions of the Guidebook with respect to issues of standing seem to be motivated by a desire to be inclusive, that is, to apply a liberal standard that is easily met. Section 10-607(4) no longer includes an aggrievement test when determining who can petition the courts on a land use matter, and Section 10-607(5) is acknowledged in the commentary to afford standing to persons who haven't even participated in the agency's hearings. **Perhaps this approach follows from the current trend of greater public participation in planning. I wholeheartedly support the idea of extensive public participation in *planning*. However, it does not follow from this that broad public participation in development review or in judicial review of site-specific development proposals is a good thing. On the contrary, such participation would be detrimental and open the door to undermining the work of the greater citizenry that helped to produce and articulate the broad public policy themes of the comprehensive plan. Liberal standards of public involvement are appropriate at the level of planning, policy, and broad regulatory enactments such as comprehensive zoning and zoning ordinance text amendments. But the standards should become stricter as we move down to levels of post-zoning implementation, such as site-specific project review, and judicial review.**

The public generally shares this view as evidenced by the overwhelming rejection of Amendment 24 in Colorado and of Proposition 202 in Arizona in the November 2000, elections. **A specific development proposal that is consistent with the comprehensive plan and development regulations is also consistent with the greater public's "vision" for the future.** It does violence to this vision

when we open the appeal process liberally to active special interests, no matter how well intentioned, and permit them to derail worthy projects that do not comport with their particular vision. A community cannot achieve its vision of "smart growth" without a smart process that preserves and protects its adopted vision from naysayers in the community.

Major issues decided at the comprehensive planning and zoning stage, such as use, density or intensity, should *not* be revisited in the post-zoning site-specific proceeding *unless* the application does not comply with these decisions. It is critical that this principle be recognized in the Guidebook. Otherwise, there will be no protection or political cover for decision-makers from the onslaught of entrenched growth opponents who reside in areas planned for growth. They could stop the proposed growth allowed in the Master Plan, oppose adopted public policy and create costly delays.

LEGAL ANALYSIS OF THE GUIDEBOOK'S APPROACH TO STANDING

- **After previously acknowledging that "aggrieved" status (with the twin elements of special harm or injury distinct from any harm or injury caused to the public generally) should be the primary criterion in determining one's standing to petition for judicial review of a land use decision, the final draft Guidebook guts any such requirement. First, the definition of "aggrieved" in Section 10-101 has been revised to make both "special" and "distinct from any harm or injury caused to the public generally" optional. The principal definition now requires merely an undefined generalized showing of "harm or injury" in order for one to have standing.** (This is similar to the discredited "may be prejudiced" test advanced in prior drafts, and is also contrary to the understandings reached at the Directorate's final meetings on September 23-24, 2001.)

- **Second, Section 10-607(4) now broadly allows "all other persons" who participated by right in an administrative review or who were "parties to a record" to seek judicial review without *any* showing of aggrieved status.** This appears to be based upon comments by the Staff in an October 12, 2001, Memorandum to Directorate members suggesting that a showing of aggrievement on judicial review is unnecessary in a record appeal when the challenger has already been deemed to be aggrieved by the local government agency (October 12, 2001, Memorandum, p. 5). This view is contrary to established legal precedent, since it is within the purview of the court – not the administrative agency whose decision is under review – to determine whether or not the challenger is aggrieved. The court's authority cannot be usurped by an agency determination regarding aggrieved status. See, e.g., *Sugarloaf Citizens Assn. v. Department of Environment*, 686 A.2d 605 (Md. 1996), discussing the difference between administrative standing before an agency and the requirement for standing to challenge the agency's decision in court. While the former rule is not very strict, "judicial review standing" requires that one be both a party before the agency and "aggrieved" by the agency's final decision (*i.e.*, specifically affected in a way different from the public at large). Determination of judicial review standing is exclusively a judicial function and the court need give no deference to the agency's finding in this regard. *Id.* Section 10-607(4) is a legally flawed criterion, which effectively allows the administrative agency whose decision is under review to determine who shall be "aggrieved."

- **Third, Section 10-607(5) allows "any other person," including persons who have skipped the agency proceedings altogether, to seek judicial review merely upon a showing that they are "aggrieved" under the expansive new definition of that term in Section 10-101.**

- **Treatise writers favor the traditional aggrievement standard.** As can be seen from the following examples, the views expressed herein regarding Sections 10-101 and 10-607(4) and (5) are shared almost universally by treatise writers and courts.

  - "Almost all state statutes contain the 'person aggrieved' provision but only a minority extend standing to taxpayers . . .

    Under the usual formulation of the rule, third-party standing requires 'special' damage to an interest or property right that is different from the damage the general public suffers from a zoning restriction. Competitive injury, for example, is not enough. This rule reflects the nuisance basis of zoning, which protects property owners only from damage caused by adjacent incompatible uses. Although the special damage rule is well entrenched in zoning law, a few courts have modified it. New Jersey has adopted a liberal third-party standing rule that requires only a showing of "a sufficient stake and real adverseness." Daniel M. Mandelker, *Land Use Law* § 8.02 at 337 (4th ed. 1997) (emphasis added) (citations omitted).

  - The requirement that a person must be 'aggrieved' in order to appeal from the board of adjustment to a court of record was originally included in the Standard State Zoning Enabling Act and has been adopted by most of the states. *See* Kenneth H. Young, *Anderson's American Law of Zoning* § 27.09 (4th ed. 1997).

  - "To be a person aggrieved by administrative conduct, it is necessary to have a more specific and pecuniary interest in the decision of which review is sought. A Connecticut court said that in order to appeal, ***plaintiffs are required to establish that they were aggrieved by showing that they had a specific, personal and legal interest in the subject matter of the decision as distinguished from a general interest such as is the concern of all members of the community and that they were specially and injuriously affected in their property or other legal rights."*** *Id.*, § 27.10 at 523-24 (Citations omitted.) (Emphasis added.)

- **Case law in many jurisdictions is in accord with the special injury rule.** See, *e.g.*, *Hall v. Planning Comm'n of Ledyard*, 435 A.2d 975 (Conn. 1980); *DeKalb v. Wapensky*, 315 S.E.2d 873 (Ga. 1984); *East Diamond Head Ass'n v. Zoning Bd. Of Appeals of City and County of Honolulu*, 479 P.2d 796 (Haw. 1971); *Sugarloaf Citizens Ass'n v. Department of Env't*, 686 A.2d 605 (Md. 1996); *Bell v. Zoning Appeals of Gloucester*, 709 N.E.2d 815 (Mass. 1999); and *Copple v. City of Lincoln*, 315 N.W.2d 628 (Neb. 1982).

- **In view of these and other long established precedents for establishing aggrievement as the standard for participating in the proceedings of local government agencies and thereafter, for challenging their decisions in court, it is disappointing that gaping loopholes have been inserted in the Guidebook that (a) allow persons who are not aggrieved to gain standing before agencies and thereafter in court to contest an agency decision (§ 10-607(4)), and (b) allow other persons, including adjacent residents – thus *prima facia* aggrieved – to bypass the agency proceeding altogether and hold their challenge for court (§ 10-607(5)).**

RECOMMENDED SOLUTION:

AVOIDING REOPENING OF SETTLED ISSUES

To avoid reopening issues settled in the adoption of a comprehensive plan, a ninth item should be added to Section 10-207 (Record Hearings) to state that when any site specific development application is submitted for review under this section within six years of the adoption or amendment of the

plan, major issues such as land use, density or intensity *shall not be reargued or reconsidered.* The only limited exceptions to this prohibition should be if the proposed use of the site is not in accordance with the plan, or if the density or intensity proposed for the site exceeds that in the plan and applicable zone.

This is based on the sound premise that the site-specific proceeding should not become a forum to reopen debate on the community's already decided broad land use and growth policies. *See* J. Tryniecki, *Land Use Regulation: A Legal Analysis and Practical Application of Land Use Law* 323 (American Bar Assn. 1998).

STANDING TO SEEK JUDICIAL REVIEW

Items (4) and (5) of Section 10-607 (Standing and Intervention) should be deleted and new Sections 10-607 (4) and (5) should be added to provide that only those persons who both participated in the record hearing and are aggrieved (i.e., will suffer special harm or injury distinct from that caused to the public generally) by the land use decision has standing to intervene in the land use decision.

Supplementation of the Record

In a proposal that closely mirrors expanded standing, an optional provision in the Guidebook would allow for expansion of the record by the court that hears a land use challenge. Parties would be able to introduce new studies, new testimony and new exhibits that were never made available to the local jurisdiction that issued the land use decision in the first place. Neither would the applicant have had an opportunity to challenge, verify, or modify them in a deliberative process. Such a proposal would turn courts into planning and zoning appeals boards, allowing them not only to second guess a local decision, but to make a decision entirely on their own with no deference to local concerns.

In the final meeting of the Directorate, it was my understanding that the commentary would be modified to include a statement that remand is preferable to supplementation where the evidentiary record is inadequate. The statement added to the October 2001 Draft of the Guidebook leaves the issue ambiguous and open to interpretation that is destructively broad.

Section 10-613 and the commentary preceding it address the pros and cons of courts supplementing the record. The commentary mentions such factors as time, fairness, cost, experience, etc. that should be weighed but neglects one very important consideration that I believe may override the others. That is the importance of maintaining a separation of power between the legislature and the judiciary. It is acknowledged that local legislative bodies may be subject to political pressure, but that is the essence of representative democracy. In our system of government, it is the job of legislative bodies to debate public policy and in the end to make decisions that reflect the dominant view. In contrast, the job of the judiciary in record appeals from decisions of local government legislative and administrative bodies is to review the decision-making process to ensure fairness, to see that the decision is in accordance with the law, and to review the record based upon a reasonableness standard (i.e. substantial evidence/nor clearly erroneous), **but not to substitute its judgment for that of the local government decisionmaker.**

I believe subsections 10-613(1)(d) and 10-613(2) blur the distinction between the acts of local government legislatures and administrative bodies on the one hand and the judiciary on the other and permit the judiciary to usurp the proper role and powers of these bodies. Land use decisions are by nature political decisions, thus the proper places for the resolution of competing views are the local legislature, planning board, or board of appeals, not the courtroom. **If, upon review of the record, it**

is found that the decisionmaker did not consider essential information, the judge should remand the case back to it with instructions to consider the missing information and then make the decision. In our view judges should strongly resist the urge to rule on the substantive merits of a land use controversy. Unlike other cases that come before a judge, there may be no "right" or "wrong" in land use. Instead, the question is likely to be, "what decision provides the greatest good for the greatest number?" and that is the business of the local legislative body.

LEGAL ANALYSIS OF SUPPLEMENTATION ISSUES

- **Courts conducting "record reviews" of land use decisions should exercise judicial restraint, particularly with respect to agency findings of fact on evidentiary matters, and should not allow the record to be supplemented with additional substantive evidence on appeal,** or take other actions that would usurp the traditional authority of local government in the land use approval process. The Guidebook would broadly allow supplementation of the record by reviewing courts, a dangerous precedent as it would make the court – not the local government – the final decisionmaker in land use cases.

- The most objectionable provision is Optional Section 10-613(1)(d), which states that a reviewing court "may supplement the record with additional evidence" if it relates to "matters indispensable to the equitable disposition of the appeal." **This is an open-ended invitation to abuse.**

- **Treatise writers and court decisions have narrowly construed the role of courts on judicial review.**

  - **"The local government, not the court, should be the final decision-maker in land use cases.** Generally, the judge's role in land use litigation is "to provide a forum for serious and disinterested review of the issues, sharply limited in scope but independent of the immediate pressures which often play upon the legislative and administrative decision-making processes." Williams, *American Land Planning Law* § 4.05 at 100 (1988 Revision) (emphasis added).

  - Historically, reviewing courts have emulated the Uniform Administrative Procedure Act by limiting their review of an agency action to the question of whether that action was arbitrary, capricious, unreasonable or illegal. Where the agency record is inadequate to support its action, the proper practice is to remand the matter to the agency for rehearing and redetermination. *Carbone v. Weehawken Township Planning Bd.*, 421 A.2d 144 (N.J. Super. 1980). *See also, Yokely's Law of Subdivisions* § 69(c) (2d ed. 1981). *See also*, Kenneth H. Young, *Anderson's American Law of Zoning* §27.29 at 605 (4th ed. 1997): ("Reviewing courts say they are not superzoning boards and that they will not weigh the evidence.")

- **These authorities and numerous other reported cases reflect the overwhelming consensus that an appellate court or a trial court should not be second-guessing an administrative finding.**

  - Federal Circuit

    SFK USA INC. v. United States, No. 00-1305, 2001 WL 567509 (Fed. Cir. May 25, 2001) (Where an administrative agency defends its decision before reviewing court on the grounds it previously articulated, the court's obligation is clear: it reviews the agency's decision under Administrative Procedure Act (APA) and any other applicable law, and based on its decision on the merits, it affirms or reverses, with or without a remand. 5 U.S.C.A. § 551 et seq.);

- State Courts

  Numerous state courts, including courts in California, Connecticut, Maryland and Pennsylvania, hold that the scope of judicial review is narrow; that remand is the appropriate remedy when an agency has applied the wrong legal standard; and that the court should not substitute its judgment for that of the agency.

RECOMMENDED SOLUTION: Delete optional § 10-613(1)(d) and § 10-613(2) as authority for a court to supplement the record.

Sanctions for Inconsistency and Lack of Periodic Review

The desire for some "stick" to compel local governments to comply with state statutes regarding consistency of regulations with plans and for periodic reviews of plans and regulations is understandable. However, I have made known my opinion on several occasions that the sticks proposed—voiding and loss of the presumption of reasonableness of local land development regulations—are poor ones. **This approach unfairly jeopardizes the status of development approvals already issued or under review, threatens the stability of the land development process, and introduces unacceptable risk into development financing.**

LEGAL ANALYSIS OF SANCTION PROVISIONS

- **Unwise sanctions are imposed for failure of local governments to timely meet statutory milestones, *i.e.*, failure to:**
  - adopt **regulations consistent with the comprehensive plan (§ 8-104);**
  - review **development regulations (§ 8-107);**
  - update **development standards (§ 8-401); and**
  - **record the comprehensive plan and regulations in the GIS Index (§ 15-202).**
- **Missing these milestones has the effect of making local government regulations or comprehensive plans "void," "voidable," "not effective;"** or subject to **losing their "presumption of reasonableness."** These are strong terms with serious legal implications that **can place the regulatory framework in legal limbo and undermine the process by which land development is reviewed and financed.** The following statements illustrate why.
  - "We recognize the uncertainty and possible chaos that might accompany invalidation of the County's existing zoning scheme." *Pennington County v. Moore,* 525 N.W.2d 257, 260, n.3 (S.D. 1994).
  - Void conditions are subject to collateral attack at any time. *Elkhart County Bd. of Zoning Appeals v. Earthmovers, Inc.*, 631 N.E.2d 927, 931 (Ind. Ct. App. 1994); *Sitkowski v. Zoning Bd. of Adjustment of Borough of Lavalette*, 569 A.2d 837 (N.J. Super. Ct. App. Div. 1990).
  - Avoidable provision is "valid until annulled and is "capable of being affirmed or rejected at the option of one of the parties." Black's Law Dictionary 1569 (1979).

- "The importance of the presumption [of validity] is that it formally fixes the responsibility for planning policy in the legislature, and prompts a reviewing court to exercise restraint. 1 *Anderson's American Law of Zoning* § 3.13 at 117 (4th ed. 1996).

- *Ching v. San Francisco Bd. of Permit Appeals (Harsch Inv. Corp.)*, 60 Cal. App. 4th 888 (Cal. Ct. App. 1998) (statute imposed 90-day limitations period for attacking a local zoning decision).

  > "The clear legislative intent of this statute is to establish a short limitations period in order **to give governmental zoning decisions certainty, permitting them to take effect quickly and giving property owners the necessary confidence to proceed with approved projects.**" *Id.* at 893. (Emphasis added.)

- The October 2001 Draft has addressed these concerns with respect to Section 8-107. **However, the same defects in Sections 8-104, 8-401, and 15-202 remain unaddressed.**

RECOMMENDED SOLUTION: The section entitled Consistency of Land Development Regulations with Local Comprehensive Plan states that actions not consistent with the comprehensive plan shall be voidable. This section *should not provide* that a failure to comply with timeframes for updating comprehensive plans will affect the validity of any land development regulation or land use action of the local government.

The Section on Uniform Development Standards should not provide that the failure of state planning agencies to conduct a timely general review and report of uniform development standards will result in the standards loosing their presumption reasonableness. This section should state that failure to file a timely report as required by this section *shall not* affect the validity or presumption of reasonableness of existing uniform development standards, nor of permits issued pursuant to such standards.

Section 15-202 (Recordation Requirements) should not suggest that the failure to comply with recording requirements will render comprehensive plan, subplans, and land development regulations "not effective." Instead, this section should state that the failure to comply with the recording requirements of this Chapter shall not affect the validity, effectiveness or presumption of correctness of any plan or land development regulation.

Exhaustion of Remedies

An essential element of smart process is a means of establishing when the approval process has run its full course and a land development decision is final. If the decision process is open-ended and lacks closure, then it is also unpredictable. Unpredictability adds delay and risk, and the costs associated with risk and delay are ultimately paid by consumers as well as by taxpayers.

I applaud the authors of the Guidebook for the needed and progressive reform proposed in Section 10-603 on the finality of land use decisions. Unfortunately, this important reform is contradicted and negated by the provisions of Section 10-604, Exhaustion of Remedies. To support the provisions on finality the Guidebook should have provided here for streamlined qualification for appeals and made clear that in normal circumstances an applicant need only apply for remedies that are actually available. The Guidebook also fails to consider and include among its criteria for finality important guidelines from the Supreme Court's recent decision in *Palazzolo v. Rhode Island.*

LEGAL ANALYSIS OF ADMINISTRATIVE EXHAUSTION

- **The well-conceived ripeness reforms (§§ 10-201, 10-202, 10-203, 10-210, and 10-603) may have been undone by overly complex requirements for exhaustion of remedies.** The Model requires an applicant to exhaust *three* additional remedies *after* the initial agency decision before seeking judicial review (§ 10-604). (This has always been a "ripe" area for abuse of process.)

  - Unless the administrative remedy is futile or inadequate, applicants must:

    - appeal for administrative review (§ 10-209);

    - apply for a conditional use (§ 10-502); and

    - seek a variance (§ 10-503).

  - **Exhaustion of these "remedies" could add years to the review process and effectively gut the ripeness reforms.** This, on top of a growing trend in state courts to apply the draconian ripeness standards used in federal courts. *See* Daniel R. Mandelker, *Land Use Law* § 8.08.10 (4th ed. & Supp. 2000).

    Professor Mandelker, although a self-described "regulatory hawk", has long been a critic of abusive practices in agencies and courts regarding the finality doctrine as espoused in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). *See* Testimony of Daniel R. Mandelker regarding HR 1534 before the House Judiciary Committee, Subcommittee on Courts and Intellectual Property, September 25, 1997. *See also* Amicus Brief of the American Planning Association in *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997). This portion of APA's brief was later "repudiated" by APA in its testimony to Congress opposing HR 1534. *See* letter of September 16, 1997, from APA President, Eric Damian Kelly, to the Honorable Henry J. Hyde, Chair, House Judiciary Committee. These practices have made it virtually impossible for Fifth Amendment Takings claimants to gain access to federal courts. *See* J. Delaney and D. Desiderio, *Who Will Clean Up The Ripeness Mess? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 13 Urb. Law. 195 (1999).

  - **Public agency abuse of the land use review process has long been a concern.** An excellent discussion and compilation of some of the numerous commentaries on this serious problem may be found in the June 2001 issue of ZONING AND PLANNING LAW REPORT. See Rodney L. Cobb, *Land Use Law: Marred by Public Agency Abuse*, ZONING AND PLANNING LAW REPORT, Vol. 24, No. 6.

- ***Palazzolo*: The Supreme Court's Latest Statement on Ripeness**

  In ***Palazzolo v. Rhode Island***, 121 S.Ct. 2448 (2001), which is not mentioned in the October 2001 Draft's commentary on Section 10-604, six members of the United States Supreme Court provided important direction on the issue of ripeness. The Court stated:

  > "While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."

RECOMMENDED SOLUTION: At the final meeting of the Directorate, I understood that the final draft would be amended to add that an applicant should not have to seek approval of a conditional use when such a use would not be practical for the applicant. Instead, Section 10-604(1) uses the more ambiguous term "applicable" regarding both conditional uses and variances. The explanatory language states that "if there is no conditional use provision applicable to the property" as zoned, the applicant does not have to seek a conditional use before commencing judicial review. This is not the problem I was concerned about. For example, an applicant seeking approval of a 10-lot residential subdivision would not be interested in having to file for a group home or medical clinic—*even if available in the zoning ordinance*. To avoid abuse and unnecessary filing of applications, as discussed in *Palazzolo*, Section 10-604(1) should be revised to delete the requirement to seek approval of a conditional use (as provided in § 10-502) and to limit the exhaustion requirement to a *practical* remedy, which *might be* either an appeal for administrative review (§ 10-209) or filing for a variance (§ 10-503).

Moratoria

Moratoria are indicators of planning failure. Clearly, absent some catastrophe or unforeseeable event, a reasonable planning process should not lead to a pass where growth is brought to a stop by fiat. But, catastrophes and unforeseen events do occur from time to time, and the law in most states allows for temporary moratoria to protect public health and safety. However, when the difficulty arises because of a failure to plan or inadequate planning, those responsible should not escape the consequences of their failure. Nor should the building industry and housing consumers suffer from the failure of others to do their jobs properly.

It is recognized that local communities are often challenged by the impacts of growth, particularly impacts on infrastructure. That is why it is so important to plan for infrastructure at the same time the community is planning for the expansion of population, jobs, and housing. While it is one thing to create a plan for the provision of public facilities, it is another thing to finance and implement that plan. Not every community does a good job getting infrastructure built. Other spending priorities and pressure to keep taxes low make it difficult to keep up with infrastructure demands. Nonetheless, getting infrastructure built is a public sector responsibility. It is too easy to use moratoria to escape this responsibility.

The October 2001 draft deletes the provisions in the Guidebook that would have permitted moratoria to be imposed on the grounds of "any significant threat to the… environment," and in lieu thereof inserts protection of the "general welfare" as an additional ground for imposing moratoria. While "general welfare" is an improvement over singling out "the environment" as one element of public policy that should be allowed to trump other pressing public needs, such as affordable housing and jobs, it is a broad standard that can be used to allow moratoria to be imposed for virtually any reason. **At the final Directorate meeting, it was agreed that the "or the environment" standard would be excised wherever it appeared in the Guidebook. This has apparently not been done. *See, e.g.*, optional §8-604(4), which was the section under discussion, let alone other possible sections in the Guidebook.**

The Guidebook also permits moratoria while the government prepares, adopts or amends comprehensive plans, historic preservation plans or land development regulations, absent any looming threat to public health or safety (Section 8-604 (3)(b) and (c)). The provisions for potentially indefinite, open-ended moratoria (see for e.g., Sections 8-604(3)(b) under Alternative 2, 8-604(8) and 8-604(10)) are inappropriate. Moratoria should be for a definite, fixed period, in no case to exceed one year.

Moratoria are serious, last-resort measures that should be judiciously applied. When the legal criteria for moratoria are difficult to satisfy, an incentive is created to plan more carefully. The whole point of the Growing Smart exercise is to change and improve the level of planning, and incentives have a role in bringing that about.

Accordingly, a strict standard of "danger to public health and safety" that must be established before a moratorium may be declared would be fitting. This standard, observed by several states, reflects a public policy that moratoria are serious matters not to be used as a convenience, but as a last resort. While a moratorium may stop the issuance of development permits, it has no effect on housing demand. Its effect may thus be to direct growth outside the boundaries of the government that declared the moratorium and thereby contribute to sprawl. For this reason, states may wish to limit local governments' power to use this tool by adopting a strict standard. In addition, states may wish to adopt a strict standard to ensure that local governments take seriously their responsibility to plan for and build infrastructure. If the standards for use of moratoria are set too low, then there is less incentive to do a good job of planning. With proper planning, most conditions that might give rise to use of moratoria should be avoidable. In rare cases, where even good planning cannot prevent an unforeseen danger to public health and safety, the statutory language in this alternative would permit limited use of a moratorium.

LEGAL ANALYSIS OF MORATORIA PROVISIONS

The Guidebook authorizes moratoria on a virtual open-ended basis (up to 1.5 years or more), and "planning moratoria" (up to 2 years or more) are also authorized (§ 8-604). In addition, no meaningful restrictions on moratoria are provided in designated growth areas.

- In designated Smart Growth areas, moratoria should be:
  - limited to circumstances in which a serious threat to public health or safety exists;
  - limited as to duration; and
  - the government entity imposing the moratorium should be required to immediately address and resolve the problems giving rise to the moratorium. *See Westwood Forest Estates v. Village of S. Nyack*, 244 N.E.2d 700 (N.Y. 1969).
- Moratoria are not part of the planning and zoning process. Rather, they are often the result of a failure to properly plan.
  - **"Planning moratoria" should generally be prohibited or severely limited.**

    > "Even construing the provisions of the [enabling act] liberally, we find that the power to enact a zoning ordinance, for whatever purpose, does not necessarily include the power to suspend a valid zoning ordinance to the prejudice of a land owner... *More significantly, the power to suspend land development has historically been viewed in this Commonwealth as a power distinct from and not incidental to any power to regulate land development.* Accordingly, as the [enabling act] is silent regarding land planning through the temporary suspension of development, we decline to condone a municipality's exercise of such power." *Naylor v. Township of Hellam*, 773 A.2d 770 (Pa. 2001) (emphasis added).

- Moratoria raise takings issues as well. *See* D.R. Mandelker and J.M. Payne, *Planning and Control of Development, Cases and Materials* 642 (5th ed. 2001).

- Significantly, on June 28, 2001, the United States Supreme Court granted certiorari in the case of ***Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,*** 228 F.3d 998 (9th Cir. 2000), *cert. granted,* 121 S.Ct. 2859, 150 L. Ed. 2d 749 (U.S. June 28, 2001). Certiorari was granted on the question "[w]hether the Court of Appeals properly determined that a temporary moratorium on land development does not a constitute a taking of property requiring compensation under the takings clause of the United States Constitution."

RECOMMENDED SOLUTION: Delete Alternative 1 in § 8-604(3), as it would authorize moratoria to be imposed for virtually any reason.

Delete Alternative 2 in § 8-604(3), particularly §§ 8-604(3)(b) and (c), allowing planning moratoria of 2 years (or more). Planning moratoria should not be allowed, and if allowed, should *never* exceed six months.

Revise § 8-604(8) to limit extensions of moratoria – other than planning moratoria, which should not be extended – to not more than one six-month period, and only upon a finding of "compelling need" as defined in § 8-604 Alternatives (2)(d) and (3)(b).

Delete § 8-604(10)(a) and (b) which allow state or local governments to impose additional "temporary moratoria" upon already issued permits or to adopt "temporary policies" against approving zoning map amendments. Alternatively, these additional restrictions should only be imposed upon a finding of "compelling need" as defined in §§ 8-604(2)(d) and (3)(b).

Vested Right to Develop

Traditional late vesting rules in effect in most states are out of date and unfair. These require issuance of a building permit and commencement of construction (or other acts of reliance) in order for rights to vest. Late vesting rules do not recognize the complexity of the modern regulatory environment, or the difference between a single building project on the one hand, and long-term land development or multi-building projects on the other. Statutory reform is urgently needed in this area and the Guidebook has taken steps to provide it. Vesting of development rights should be recognized earlier in the process, such as at the time of subdivision or site plan approval, or at the time of filing of a complete application for subdivision/site plan approval.

A legally vested right to develop land is essential to the stability of development pro-cesses and real estate markets. The Guidebook, in Section 8-501, provides two alternatives. The first alternative is a vesting model that establishes a vested right to develop (which includes design, planning and preparation of the land for development, as well as construction) as soon as a complete development application is filed. The second alternative has been modified from the previous second alternative that required the issuance of a permit *and* "substantial and visible construction" to one that allows vesting based upon "significant and ascertainable development" pursuant to a development permit. This is much more equitable than the original second alternative since it appears to recognize expenditures (and other acts of reliance) based on the *development of the property,* rather than merely on construction of one or more buildings. The development process, from design to approval to construction, is significantly more complex today than it was fifty years ago.

Although the proposed first alternative allowing vesting to occur upon submission of a complete application is laudable and is recognized in some states, it may be more reform than some other

states are willing to undertake. Thus, the second alternative proposed in the October 2001 Draft is also appropriate *if* it is interpreted as recognizing vested rights based upon *development* work pursuant to appropriate approvals, rather than upon construction of a building or buildings pursuant to a building permit. (See Legal Analysis.)

LEGAL ANALYSIS OF VESTING PROVISIONS

- **In today's world, the land use regulatory process has become increasingly elongated and complex, with environmental permitting often overlaying the traditional review process, regulations proliferating, more reviewing agencies in the mix, and more public hearings. All of these factors, and the increasing uncertainty that accompanies them, have led to a serious problem, particularly for long-term, multi-building projects, which must receive many development approvals before the first building permit is obtained.** The design and approval phases of any development, particularly one which involves multiple buildings, is time consuming and expensive. Before a single footing is poured, architects and experts must be hired, attorneys retained, engineering started, a series of regulatory systems navigated, equipment leased, materials ordered, financing arranged and site development work commenced. Thus, it is appropriate that "development" activity pursuant to government approvals, and not merely "construction" of a building or buildings pursuant to a building permit, be the criterion for recognizing vested rights.

- However, it must be noted that the Guidebook's definition of "development permit" lists a number of approvals, *including* a "building permit" (§ 10-101), could be interpreted to apply solely to a building permit. If this were to be the interpretation, the language would have the exact opposite effect of what was intended, which was to suggest an early vesting rule that recognizes the huge expense and commitments required to prepare a development plan and proposal. Thus, the revised second alternative in Section 8-501, if it were to be interpreted to be applicable only to a building permit, could also be construed as authorizing a late vesting rule – similar to the common law vesting rule in effect in approximately 30 states – that would not confer vested status on a project until after a *building permit* has been issued and significant and ascertainable construction thereunder has occurred. This would be a draconian imposition of the rule in today's multi-layered regulatory environment because it ignores the often numerous development approvals that a project may have previously received and implemented. If applied in this manner, the revised section relating vested status to significant and ascertainable development pursuant to a development permit would not affect meaningful reform and instead would only embalm the status quo. (Unfortunately, the Guidebook's definition of "development permit" does not include preliminary subdivision plans.)

- Approximately 12 states have enacted vesting laws, several of which recognize one's right to proceed with development under the law in effect at the time of approval of a site-specific application, such as a preliminary subdivision plan. Other states' laws (*e.g.*, Connecticut) allow vesting even earlier, such as at the time of submission of the initial development application. Both of these approaches are reasonable.

- Maryland is cited in the Guidebook as a primary source of the late vesting rule, which is as it should be, since Maryland's "very late" vesting rule is among the most inflexible in the country. Indeed, Maryland courts have not recognized vested rights under this rule ***even in circumstances where the landowner's failure to acquire the requisite building permit and commence construction is the result of previously adjudicated or acknowledged unlawful conduct of the government.*** *See, e.g., Sycamore Realty Co. Inc. v. People's Counsel of Baltimore County*, 684 A.2d 1331 (Md. 1996); *Rockville Fuel & Feed Co. v. Board of Appeals*, 291 A.2d 672 (Md. 1972).

RECOMMENDED SOLUTION: Retain Alternative 1 and revise Alternative 2 to clarify that vesting upon commencement of ascertainable development does not require that the project must have received a building permit. Amend the definition of "development permit" in Section 10-101 to include preliminary subdivision plans or plats. Commonly, most of the detailed (and expensive) engineering design work must be accomplished in preparation at the preliminary plat stage.

Third-party Initiated Zoning Petitions

I strongly object to subsections 8-103(1)(d) and (e), which allow new land development regulations (and zoning changes) to be initiated either by petition of owners of record lots constituting "51% of the area that is to be the subject of the proposed ordinance," or by petition of a stated minimum number of "bona fide adult residents of the local government [sic]." At the final Directorate meeting, it was indicated that the text would include a statement that petitions of this nature should be disfavored. The language that has been added does not adequately convey that the initiative process is extremely destabilizing to orderly planning and social equity and undermines settled planning and zoning decisions. It is all the more so when it can be accomplished by a mere plebiscite of a neighborhood. Neighborhood plebiscites to effect zoning changes are unlawful in many states. See, for example, *Benner v. Tribbit*, 57 A.2d 346 (Md. 1948). There is an excellent discussion of this problem in the case of *Township of Sparta v. Spillane*, 312 A.2d 154 (N.J. Super. 1973). The fact that a minority of states authorizes the initiative process through their constitutions or state enabling laws by no means establishes the wisdom of this process, or its value in achieving the goals of Smart Growth. It is helpful that the final draft has been amended to recognize this point.

LEGAL ANALYSIS OF THIRD PARTY ZONING PETITIONS

- The Guidebook acknowledges that some states authorize land development regulations to be initiated:
  - By 51% or more of record lot owners "in the area that is to be the subject of the proposed ordinance" (§ 8-103(1)(d)), or
  - By "petition of a minimum percentage of bona fide adult residents" of the jurisdiction (§ 8-103(1)(e)).
- **Allowing local land use regulations to be enacted via voter initiative or by a neighborhood plebiscite can completely destabilize the land use regulatory pro-cess and promote exclusionary zoning**. The fact that the local legislative body would make the final decision regarding enactment of the proposed legislation does not ameliorate the mob hysteria that often accompanies such initiatives. See, *e.g., City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976), *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert den.*, 422 U.S. 1042 (1975). Neighborhood plebiscites are often used to affect the civil rights or property rights of others.
- Of course, initiatives that are authorized by State Constitutions are likely beyond the reach of remedial legislation. **However, the *Model* should not *encourage* the use of initiatives as they have been almost universally criticized as antithetical to good governance and good planning.** *See, e.g.,* David Broder, *Democracy Derailed – Initiative Campaigns and the Power of Money* (Harcourt) (author is a senior columnist for the *Washington Post*).
- **Criticism of the initiative as a tool** for **planning and zoning has been particularly harsh and widespread.** *See, e.g.,* Nicholas M. Kublicki, *Land Use by, for, and of the People: Problems with*

the Application of Initiatives and Referenda to the Zoning Process, 19 Pepp. L. Rev. 99, at 104, 105, 155, 157-158 (1991).

- **Courts have been equally suspicious of the initiative and referendum.** See, for example:

  Township of Sparta v. Spillane, 321 A.2d 154, 157 (N.J. Super. 1973) ("Among other things, the social, economic, and physical characteristics of the community should be considered. The achievement of these goals might well be jeopardized by piecemeal attacks on the zoning ordinances if referenda were permissible for review of any amendment. Sporadic attacks on a municipality's comprehensive plan would tend to fragment zoning without any overriding concept."). To the same effect are: *Benner v. Tribbit*, 57 A.2d 346, 353 (Md. 1948); *Leonard v. City of Bothell*, 557 P.2d 1306, 1309-10 (Wash. 1976); *City of Scottsdale v. Superior Court*, 439 P.2d 290, 293 (Ariz. 1968).

RECOMMENDED SOLUTION: Delete § 8-103(1)(d) authorizing ordinance text and map amendments to be "initiated" by 51 percent of the owners of lots of record in "the area" that is to be the subject of the proposed ordinance, and replace it with a new § 8-103(1)(d), which would allow owners of lots of record to *apply* to the local government legislature for regulatory relief in situations affecting their property or the general community. The local government would retain the discretion whether to accept or consider the amendment application.

Of course, a landowner's right to seek redress of a site-specific problem through legislation (such as a zoning text amendment) would not absolve the local government from evaluating the proposed amendment on the basis of whether it would promote the health, safety, and welfare of the general public.

Similarly, optional Section 8-103(1)(e), authorizing a specified percentage of adult residents of the local government to petition for ordinance amendments, should be deleted. If a single category, or a group of citizens, have a meritorious case for amending an ordinance, they can pursue it under §§ 8-103(1)(a), (b) and (c) by convincing their legislative body or planning agency of the merits of their proposal. If they are dissatisfied with the outcome, they can voice their displeasure in the next election.

Designation of Critical and Sensitive Areas

The Guidebook defines "critical and sensitive areas" as those areas that contain or constitute natural resources sensitive to excessive or inappropriate development. (Section 9-101(3)(c)). This definition is extremely broad. All areas can contain or constitute some natural resource. Certainly, any undeveloped property could easily be categorized as containing or constituting a "natural resource." In fact, no definition of "natural resource is provided within the text. Furthermore, the Guidebook definition refers to "excessive or inappropriate development" but does not attempt to define what these terms mean. Without a clear, concise definition, any development could be identified as "excessive or inappropriate." *Such lack of clarity or of any definition altogether could easily allow a local government to restrict any type of development in any area.*

The Guidebook language provides that local governments can opt out of adopting regulations for critical/sensitive areas if all critical/sensitive areas in their jurisdiction are designated as areas of "state" critical concern (Section 9-101(1)). However, just as importantly, the local government should be able to avoid adopting regulations for critical/ sensitive areas that have been designated as "critical" by the Federal government. For example, the U.S. Endangered Species Act of 1973 (ESA) requires the Federal government to designate "critical habitat" for endangered or threatened species.

The ESA provides extensive protection of "critical habitat." The ESA requires an applicant to apply for a permit from the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) if their action will likely impact an endangered or threatened species (which would likely occur in an area designated as critical habitat). The Act also requires projects within critical habitat, needing a Federal permit, approval or funding to go through a consultation process with FWS or NMFS. If the outcome of the consultation determines that the activity will likely adversely affect the survival and recovery of the species, the applicant will be required to minimize or mitigate the impacts of the activity.

RECOMMENDED SOLUTION: Provide a definition for "natural resources" similar to the following: natural resources are plants, animals, or useful minerals indigenous to a specific site that provide benefits not only to the owner of the site but to the public generally and that the exploitation of which would have a detrimental effect on the public welfare.

Amend the definition of "critical and sensitive areas" to include: lands and/or water bodies containing natural resources and/or which are themselves natural resources the exploitation of which would cause a threat to the public health, safety, or welfare.

Provide a definition for "excessive or inappropriate development" similar to the following: excessive or inappropriate development is grading, construction, or site disturbance that is unlawful or not in compliance with duly adopted regulations or not in compliance with duly issued permits.

Provide in Section 9-101(1) and/or in Section 7-202 (5) an opt-out provision for lands designated as "critical" by the federal government.

CONCLUSION

While many of my comments have been frankly critical, hopefully they will be perceived as constructive in their intent. Stuart Meck, his able staff, and important outside consultants have produced an impressive and very useful piece of work. The thoughtful and diligent work of a dedicated Directorate who read and commented extensively and constructively on literally thousands of pages of text is not to be overlooked. That the Guidebook can and should be made better is not a detraction of the work as it stands, but rather on the broad scope and great complexity of the undertaking. I consider it a privilege and a great learning opportunity to have been allowed to work on the Growing Smart Directorate.

Paul S.Barru

The following associations representing constituencies of the "built environment" hereby join in this report: National Association of Home Builders; National Association of Industrial and Office Properties; National Association of Realtors; International Council of Shopping Centers; Self Storage Association; National Multi Housing Council/National Apartment Association; American Road and Transportation Builders Association

R. JAMES CLAUS, PhD
22211 SW Pacific Highway
Sherwood, OR 97140

March 8, 2002

Honorable Mel Martinez
Secretary, Housing and Urban Develop
U.S. Department of Housing and Urban
451 7th Street S.W., Washington, DC 2

Dear Secretary Martinez:

I have never been particularly fond of being treated with a patronizing attitude; in fact, the only form of interpersonal communication I have disliked more is deliberate misrepresentation combined with delusions of cleverness and immunity from consequences. I am in receipt, however, of just such an item of communication.

I have enclosed three attachments for your attention: 1) a letter from Mr. Lawrence Thompson, Deputy General to Assistant Secretary for Policy Development and Research, Office of the Assistant Secretary for Policy Development and Research, U.S. Department of Housing and Urban Development; 2) an email from Mr. David Engel, Director, Affordable Housing and Research Technology Division, HUD, to his fellow affiliates at the American Planning Association; and 3) an article by David Engel, entitled "Toward a National Urban Environmental Policy," written and published before HUD become involved in the Legislative Guidebook project, which outlines the scheme that would be undertaken by federal employees, in spite of their fiduciary obligation to uphold federal law, rule, regulation, and decision.

Mr. Thompson's letter is both self-serving and deceitful. I urge you to review his call logs; you will find a number of requests for information from stakeholders in the built environment, only to be brushed off. Additionally, Mr. Thompson told these people that he had neither the time nor the patience for people who had not been engaged in the earlier process and already offered input, even though these stakeholders had previously been told the Legislative Guidebook did not affect their business and civil rights interests, or that no opportunity for input was forthcoming.

Only by excluding a segment of the stakeholders from the public hearings and thus avoiding their input could the American Planning Association and HUD produce the Legislative Guidebook in its present form, and I believe the parties involved knew that well. A quick inspection of the list of HUD participants inventoried in the acknowledgements in the Guidebook will reveal that the HUD reviewers who helped mastermind this assault on our civil and property rights were officials who should have understood their fiduciary obligations. Furthermore, their job titles would indicate that they should have known that recommending the regulations advocated in the Guidebook was equivalent to recommending violation of federal law.

Mr. Thompson assured me that HUD was not engaged in promoting or directing the Guidebook. However, the attached email from Mr. Engel to Stuart Meck at APA, stating that Engel would attend the Growing Smart Chicago meeting to make sure "we have the bodies to back you up" gives a different impression. Mr. Thompson's letter to me assures me that HUD is "no longer officially associated with the publication," but at least as of two days ago, HUD's web page contained a hotlink to an EPA web site which extols the virtues of the Guidebook. Additionally, as of yesterday, the HUD User web site had a hotlink directly from a page on Smart Growth to APA's web site. The firewall that should have been in place between HUD and APA appears to never have been erected. Mr. Engel's email is a smoking gun.

The third document I have enclosed is an article by a number of "activists" within the HUD elite, and lays out their plan to radicalize land use planning laws. It reveals a well-designed scheme to undercut civil rights and constitutional protections. Let me quote from page 3:

> *"With the election of President Clinton in 1992, HUD was, for the first time in many years, staffed by activist appointees who were willing to consider broad-based strategies for revitalizing cities and metropolitan regions. For their part, EPA appointees reflected new sensitivity to the urban impact of environmental regulations."*

From page 7:

> *"As Marsh, Porter, and Salvensen argue in 'The Impact of Environmental Mandates on Urban Growth,' many complaints about the administrative process could be eliminated if Federal and State environmental protection reviews were fully integrated into State and local programs for comprehensive planning and growth management. Through Federal delegation, strict performance criteria, and monitoring, individual environmental protection programs could become part of the larger local planning process. ... Such reforms could strengthen the hand of those committed to protecting wetlands, endangered habitats, and other natural resources. And by eliminating these very real process problems from the current regulatory system, environmentalists could weaken the strong coalition of regulated interests now calling for more drastic overhaul of these crucial programs."*

And from page 12:

> *"The environmental advocacy community must look to State housing and community development agencies, local zoning and planning agencies, community nonprofit organizations, and HUD for help in the development*

U. S. Department of Housing and Urban Development
Washington, D.C. 20410-8000

February 22, 2002

OFFICE OF THE ASSISTANT SECRETARY
FOR POLICY DEVELOPMENT AND RESEARCH

Robert J. Claus, Ph.D.
22211 SW Pacific Highway
Sherwood, OR 97140

Dear Dr. Claus:

President Bush received your letter of December 31, 2001, and has asked the Department of Housing and Urban Development to respond to your concerns about the "Growing Smart" *Legislative Guidebook* prepared by the American Planning Association.

I want you to know that these concerns have been given serious consideration in HUD's review of the report. I know that members of my staff who spoke with you were impressed with your analysis of the draft *Guidebook*, and gave serious consideration to your comments. I appreciate having the benefit of your views. It should also be noted that the project has been completed, and the Department is no longer officially associated with the publication.

Thank you for your continued interest in the "Growing Smart" research effort. Please let me know if I can be of further assistance.

Sincerely,

Lawrence L. Thompson
General Deputy Assistant Secretary

Toward a National Urban Environmental Policy

David Engel
Office of Policy Development and Research

Edwin Stromberg
Office of Policy Development and Research

Margery Austin Turner
The Urban Institute

Today, Federal housing and community development programs and environmental protection mandates are undergoing intense scrutiny. Long-standing strategies for improving both the built and the natural environments are being questioned. And the U.S. Department of Housing and Urban Development (HUD) and the Environmental Protection Agency (EPA) are committed to significant reinvention and reform. This can, and should, be a time for urban and environmental advocates to reexamine the interaction of their respective efforts and rediscover common objectives. Improving urban communities and protecting the natural environment have worked at cross-purposes for too long.

Environmental issues infuse every aspect of housing and community development. Federal, State, and local policies that protect the environment and the health of the Nation's citizens constrain metropolitan growth, central-city revitalization, and housing development. Correspondingly, public policies governing urban growth and development frequently determine the quality of our natural environment and the consumption of natural resources.

Although the interdependence of environmental protection and urban development seems self-evident, it has been widely ignored for the past 25 years. As a result, frictions have built up between urban and environmental constituencies, creating barriers on both sides. Today, a significant share of the political opposition to Federal environmental mandates comes from urban interests that believe these mandates overlook legitimate development goals. In addition, many housing and community development initiatives have been discredited, at least in part, because short-sighted policies ignored sound principles of environmental planning or overlooked potential threats to environmental health.

Both environmental protection and housing and community development would be better served if they were more effectively integrated, but finding common ground will not be easy. Clearly perspectives differ, and fundamental tensions between policy priorities are inevitable. Sustaining an effective dialog will require recognition by both urban and environmental advocates that they share a common policy domain. In the current climate of budget-cutting and antiregulatory fervor, we can no longer afford to pursue these critical national objectives on separate tracks. Issues of side effects, regulatory inefficiencies, and

the identification and distribution of costs can no longer be ignored. Any realistic assessment of the financial and programmatic pressures now facing housing and environmental programs requires an honest recognition that these important national objectives can no longer be addressed independently.

History

Until 1970 there was no "environmental movement" as we know it today. Rather, there were two parallel strands of advocacy that had their origins in the progressive era at the beginning of the 20th century. One strand was the conservation movement, dedicated to preserving and enhancing America's open spaces and wildlife. This traditional activity served as a pillar of the modern environmental movement. The second strand was the public health or sanitary movement, dedicated to cleaning up the squalid conditions of urban slums. The "housing reform" movement emerged from this strand and became the progenitor for many of today's housing and community development advocacy groups. As Frank Braconi points out in his article, "Environmental Regulation and Housing Affordability," the two movements were "political siblings, born during the late 19th century in reaction to an unbridled industrialization that trampled the natural environment and generated unhealthful urban squalor."

Until the advent of subsidized housing production programs in the 1930s, most public intervention in housing focussed on issues of public health, now termed *environmental health*. Concerns about overcrowding, open spaces and urban parks, light and air, sanitary facilities, potable water, and housing and building codes were major components of the housing reform movement. As the movement matured, its goals broadened and it adopted tools for improving the urban or "built" environment, such as improvements in community and regional planning, "greenbelts" and new towns, and zoning and other land use regulations for managing growth. This broader urban environmental vision was explicitly reflected in the declaration of national housing policy included in the landmark Housing Act of 1949, which sought ". . . the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation."

By the time HUD was created in 1965, a wide range of Federal programs addressed this concern for the built environment. In addition to housing production programs, the newly created Department administered urban renewal grants to cities for land assembly and redevelopment that included requirements for local housing and building code enforcement as a condition of Federal assistance. The Assistant Secretary for Metropolitan and Regional Planning administered planning grants and technical assistance programs that supported local efforts to manage urban growth. HUD assumed a leadership role in national discussions about urban sprawl and rational land use planning. Subsequent legislation mandated the Federal New Communities program as well as an annual urban growth report to Congress.

HUD's mission originally encompassed other critical dimensions of urban development as well. The urban mass transit program, now in the Department of Transportation, was originally part of HUD, linking transportation planning to regional planning and urban development initiatives. Other HUD programs provided for Model Cities, water and sewer grants, and assistance to localities for open space, neighborhood facilities, and historic preservation. Even the Federal Emergency Management Agency (FEMA) was originally part of this multifaceted Department. Although many of the programs were small, their presence within HUD reflected a broad urban environmental perspective.

The Housing and Urban Development Act of 1968 was intended to usher in a golden age of urban redevelopment during which HUD would take the lead in formulating and implementing a comprehensive urban strategy. However, while reaffirming the original 1949 goal of a decent home and a suitable living environment, the act added a production objective of 26 million housing units for the next decade, with 6 million targeted to low- and moderate-income families. This objective focussed HUD's attention on subsidized housing production, to the detriment of its broader urban development mandate. The newly elected Nixon administration initially committed substantial attention and resources to meeting the goal, finding itself far more comfortable with a "hard" housing production program than with the "softer" issues of urban sprawl, community planning, and growth management. Subsequently, the 1974 Housing and Community Development Act folded almost all of HUD's nonhousing categorical programs into block grants for cities and States. This new legislation was the product of a broad-based consensus between the administration and localities that sought increased flexibility and discretion.

The modern environmental movement emerged at approximately the same time as HUD was expanding its housing production mission and divesting itself of programs that involved broader concerns about the built environment. The first Earth Day in 1970 and the subsequent creation of EPA resulted in an agency whose constituency was specifically focussed on ecological and environmental health concerns. In addition to public health concerns, a paramount goal of the emerging environmental movement was to protect the biosphere by addressing environmental threats globally.

HUD and its constituencies — cities, nonprofit community development organizations, low-income families, and the housing industry — were generally absent from the formulation of the myriad environmental policies and programs that rapidly developed. In Congress, a separate authorizing committee structure was established for environmental issues. The National Environmental Policy Act (NEPA) of 1970 imposed requirements for environmental assessments and impact statements. In rapid order there followed the Clean Air Act (1970); Clean Water Act (1972); Noise Control Act (1972); Coastal Zone Management Act (1972); Endangered Species Act (1973); Safe Drinking Water Act (1974); Toxic Substances Control Act (1976); Resources Conservation and Recovery Act (1976); and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (1980), the funding arm of which is called *Superfund*.

During the crucial period when most of these environmental programs were being debated and enacted, HUD and much of the urban constituency seemed to have lost interest in urban environmental issues and played little or no part in shaping the programs. By the 1980s, the role of housing and urban policy advocates in formulating national environmental policy was minimal. As a result, few of the newly enacted environmental programs addressed — either implicitly or explicitly — the special needs of inner cities, metropolitan growth, or urban housing markets. With the benefit of hindsight, it seems likely that if members of HUD's urban constituencies had been more fully engaged in the development of environmental protection initiatives, these mandates would be structured differently and would be less subject to criticism from urban interest groups.

Rediscovering the Urban Interest in Environmental Protection

With the election of President Clinton in 1992, HUD was, for the first time in many years, staffed by activist appointees who were willing to consider broad-based strategies for revitalizing cities and metropolitan regions. For their part, EPA appointees reflected new

sensitivity to the urban impact of environmental regulations. While environmental issues were of little interest to HUD policymakers during the early days of the administration, pressure for a more active HUD role was building rapidly.

In 1993 the New York Citizens Housing and Planning Council, in conjunction with the New York Housing Conference, held an important meeting on housing and the environment. Although the conference was not large, its importance should not be underestimated. For the first time, strong criticism of existing environmental regulations and policies was being voiced by groups that historically had been supporters of environmental protection. Nonprofit community groups and low-income housing advocates, as well as for-profit builders and property owners, argued that many environmental regulations were endangering the economic viability of the existing housing stock and the rehabilitation or new construction of low- and moderate-income housing.

As Frank Braconi states in his article: "The movement of some national urban coalitions from strong support of environmental legislation to outspoken backing of limitations on unfunded mandates should be taken as a signal that a *threshold has been crossed."* (Emphasis added.) At the New York conference, Michael A. Stegman, HUD's Assistant Secretary for Policy Development and Research (PD&R) articulated an emerging vision for HUD policies that would begin to reconcile growing tensions between the housing and environmental communities. Since that time, HUD has sought to become a more active and constructive participant in the environmental policy debate.

As its initial foray into these uncharted waters, PD&R funded a series of four symposia in 1994–95 to explore the impact of environmental mandates on housing and urban development. This issue of *Cityscape* presents edited versions of the discussion papers prepared for the symposia, along with summaries of the proceedings. The objective of each symposium was to educate housing and environmental policymakers about their respective mandates, discuss areas of conflict, explore ways to coordinate policymaking more effectively, and identify specific actions HUD might take to address these issues. The first three symposia focussed on the impact of environmental mandates on, respectively: inner-city economic redevelopment, housing affordability, and urban growth. The fourth symposium focussed on the impact of lead-based paint mandates on privately owned rental housing.

HUD's renewed attention to environmental issues was reflected in its affirmative response to the President's Executive Order on Environmental Justice (E.O. 12898, February 11, 1994), which directed all Federal agencies to examine their policies and determine whether Federal actions impose disproportionately numerous and adverse health and environmental effects on minority and low-income populations. The order recognized that the poor—particularly the minority poor—are most at risk from serious environmental hazards resulting from Federal action. Secretary Henry G. Cisneros, in announcing the Department's Environmental Justice policy initiative, stated:

> For many Americans, especially low-income and minority families, HUD plays an active role in their quality of life and physical environment. . . . Ensuring environmental justice is a natural goal in HUD's mission and priorities. . . . HUD is helping . . . to change the way our society thinks about urban policy and environmental issues.

HUD has also worked closely with EPA, the Department of Commerce, the Department of Transportation (DOT), and the White House to incorporate environmental concerns into the administration's National Urban Policy. Further, HUD has entered into a constructive partnership with EPA to address the newly recognized issue of "urban brownfields," the name given to underutilized or vacant urban land with toxics or other industrial pollutants of soil and water that inhibit redevelopment. Until very recently, brownfields—

as a term and as an issue—were scarcely acknowledged within HUD. However, the Department has taken a number of steps, in cooperation with EPA, to encourage the redevelopment of urban brownfields. In the proposed American Community Partnership Act that would streamline the Department's community development initiatives, cleaning up urban brownfields in distressed communities is a priority.

In the context of urban brownfields, EPA, too, has come to recognize that the existing regulatory framework often works against urban revitalization, ultimately hurting the inner cities and their low-income residents. Without waiting for Superfund reform, EPA has taken dramatic actions to remove barriers and provide incentives for brownfields cleanup and redevelopment. The agency is implementing its own community-based environmental protection program and is administering a sustainable development grant program.

These actions are important first steps, but far more must be done to rebuild a complementary and supportive relationship between urban development and environmental protection. Despite several collaborative efforts, serious frictions persist. Many still believe that the goals of environmental protection are fundamentally incompatible with those of housing and community development or that they are independent policy domains and should remain separate.

Because so much of our Nation's population is urban, cities and metropolitan areas are a natural focal point for implementation of key environmental mandates. They are the sites of many of our most serious and contentious environmental issues: polluted air and water, contaminated land, environmental health hazards, and disappearing open spaces and habitats. As a result, some of the most important environmental legislation, such as the Clean Air Act, has focussed on improving America's urban environments. Clearly, these acts have been immensely successful in achieving many of their goals but, as discussed in the articles that follow, many environmental programs and regulations have inadvertently produced negative consequences for urban development, creating barriers to community revitalization and affordable housing.

Often, environmental regulations reflect a "one size fits all" approach. They do not allow for specialized urban analyses or for regulatory tools or programs specifically tailored to the circumstances of particular urban areas. However, environmental regulations are very different from other programs of universal applicability, such as Medicare or Social Security, because they have the effect of regulating and constraining development of the physical environment in our cities and urban areas. The requirements and methods used to assess a public dam or water project in the rural Southwest may not apply to a publicly assisted housing project in southwest Chicago. The regulatory tools that protect a major regional watershed may not make sense if used to regulate an artificial drainage ditch in the median strip of the New Jersey Turnpike.

As we begin to search for opportunities to craft environmental protection strategies that also promote housing and community development goals, a number of contentious issues arise. Some can be addressed relatively easily, with a bit of goodwill and true dialog, between urban and environmental interests. Others raise such fundamental questions of equity, cost allocation, or public subsidies that effective resolution—particularly during this era of diminishing resources—will be difficult. Drawing from the articles collected in this volume and the symposia for which they were prepared, we have defined four broad categories of issues. In ascending order of difficulty, they are:

- Procedural reforms.
- Balancing of social goals.

- Urban risk analysis.
- Allocation of costs.

The sections that follow explore each set of issues in turn, identifying both opportunities for compromise and key issues of disagreement.

Procedural Reforms

Although much of the current debate about existing environmental programs is very intense, many of the disagreements are not truly substantive. Rather, they involve the procedures used to administer environmental mandates. Considerable friction between environmental protection and urban development interests could be eliminated by simplifying and streamlining regulatory mechanisms.

Virtually all regulatory programs are subject to criticism by the regulated interests, which view them as administratively unworkable or unnecessarily complicated. However, environmental mandates appear to be subject to particularly intense criticism regarding administrative and enforcement processes and tools. Environmental regulations are frequently described as confusing, duplicative, and vague. The most common complaint is that environmental regulations lack a clear "road map" for the approval process. Regulators are viewed as having excessive discretion, and multilevel reviews and approvals are not always sufficiently sensitive to the costs of delay.

Land development and housing have long been heavily regulated, and developers and builders have come to accept and work within elaborate State and local regulatory systems. In many communities, local zoning ordinances and related regulations place more stringent restrictions on a developer's ability to use his or her land than do Federal or State wetlands laws. Further, although rigid density and use restrictions are the norm in many communities, it is rare for them to be attacked as regulatory "takings." Why, then, do so many builders and developers object so vehemently to environmental regulations?

Objections to the current environmental regulatory system by the building and development community cannot be dismissed as simply a smokescreen to conceal a basic unwillingness on the part of regulated businesses to comply with environmental mandates. Members of that community have accepted many regulatory burdens and incorporated them as part of the cost of doing business. As presently administered, however, many environmental protections create uncertainties and delays that make it difficult for developers and builders to predict cost impacts and factor them into development and construction plans.

Federal environmental regulations are typically single purpose and permit based. They tend to be centrally administered, independent of one another, and divorced from local building and development regulatory processes. Thus, a developer must seek multiple single-purpose permit approvals after he or she buys land and plans for development. Moreover, since few wetlands and protected habitats are mapped, the builder does not know before seeking a permit whether the land will be subject to restrictions on its use. Both Federal and State environmental land regulations also tend to be insensitive to time pressures. When local zoning and planning boards make land use decisions, they consider many issues (density, traffic, environment, open space, economic development) concurrently. In contrast, environmental reviews by Federal and State entities are generally sequential, and time is not always treated as a valuable resource.

At the HUD symposium on the impact of environmental mandates on urban growth, Gus Bauman, a nationally recognized land use expert, noted that another characteristic of

Federal and most State environmental laws is the lack of direct local accountability. The Federal environmental regulatory system is administered by officials who are far removed from the locality, and "it is impossible to correct something that is not right." Although the regulators may consult local elected officials, they—unlike most local land use regulators—are not readily identifiable and directly accountable to local elected officials. At the local level, interaction and bargaining among the various players can facilitate solutions to regulatory logjams.

The current system of NEPA-mandated environmental assessments and impact statements also fails to integrate environmental reviews sufficiently with preexisting urban planning and regulatory mechanisms. For example, even if a locality has already adopted a comprehensive plan that fully reflects environmental impacts, every federally assisted project will require an individual NEPA assessment. Such a case-by-case process not only imposes burdensome administrative delays, but may actually undermine local efforts at systematic environmental planning. It may also provide a venue for NIMBY (not-in-my-back-yard) obstructionists to oppose housing for low- and moderate-income families or other vulnerable groups.

Many States also have enacted "little NEPAs" that require an environmental assessment prior to any State action. Because any local government rezoning or variance usually constitutes a State "action," local governments are required to hold environmental reviews, which duplicate public hearings already mandated, on every rezoning request. The current NEPA system is essential when there are no established planning and land use regulatory systems in place, but in most urban areas this system ignores workable planning tools and processes. While the local planning and zoning processes may not be perfect, they represent well-tested and generally accepted tools.

As part of its reinvention process, the Clinton administration has taken important steps to simplify Federal wetlands laws. However, even more fundamental change is needed. As Marsh, Porter, and Salvesen argue in "The Impact of Environmental Mandates on Urban Growth," many complaints about the administrative process could be eliminated if Federal and State environmental protection reviews were fully integrated into State and local programs for comprehensive planning and growth management. Through Federal delegation, strict performance criteria, and monitoring, individual environmental protection programs could become part of the larger local planning process. Multiple reviews could be eliminated and conflicts among competing public policy objectives could be more effectively reconciled through single agency development approvals. Such reforms could strengthen the hand of those committed to protecting wetlands, endangered habitats, and other natural resources. And by eliminating these very real process problems from the current regulatory system, environmentalists could weaken the strong coalition of regulated interests now calling for more drastic overhaul of these crucial programs.

Balancing of Social Goals

Integrating single-purpose environmental reviews into State and local planning procedures would force local decisionmakers to treat environmental protection as one of many, perhaps competing, public policy objectives. While some existing environmental programs do call for a balancing of competing goals, practical mechanisms for achieving that objective have not been put in place. Perhaps it is the very idea of balancing that disturbs some environmental advocates and regulators. Single-purpose Federal reviews, by their very nature, assure that individual environmental goals will not be compromised by government balancing efforts at the local level, where powerful development interests may wield most of the power and influence.

Although this concern is certainly justifiable, environmental laws can be written to ensure that important national environmental objectives are adequately protected. However, all good public policy requires consideration of many valid social objectives. In fact, the balancing of interests and public objectives is implicit in NEPA, the most comprehensive of all environmental laws. The purpose of NEPA is to ensure that any adverse environmental effects of proposed governmental actions are adequately identified; it does not necessarily require mitigation. Governments may decide that other goals or benefits outweigh the environmental costs and undertake the proposed actions despite adverse environmental impacts.

A greater number of integrated strategies for balancing environmental protection with urban development objectives might actually strengthen environmental protection. For example, an integrated growth management plan that explicitly designates areas for development while systematically protecting wetlands, species habitat, and other open spaces could be much more effective at controlling urban sprawl than case-by-case environmental reviews. The case-by-case approach to environmental regulation may inadvertently reinforce existing tendencies toward sprawl, because it does not designate areas where development *should* occur. Despite the uncertainty, delay, and expense that wetlands regulations have generated, they have not resulted in either denser development in the urban core or the systematic preservation of wetlands.

Uncontrolled sprawl has weakened the economic base of older cities, isolated the poor and minorities from access to jobs and educational opportunities, increased traffic congestion and air pollution, and consumed vast amounts of valuable wetlands, farmlands, historic resources, and species habitat. Thus sprawl is an issue around which environmentalists, big city mayors, and advocates for the poor could rally. But, because there has been so little real discussion between the environmental community and urban advocates, proposals for regional land use planning are almost always over before they begin.[1]

Urban Risk Analysis

Many of the most determined opponents of existing environmental laws are advocating complex and highly technical requirements for environmental risk assessment that could bring most environmental regulation to a halt. Such proposals do not serve the best interests of cities or their low-income residents. Nevertheless, current methods for determining environmental risk and the cost of environmental protection could be enhanced so that they better reflect the circumstances of cities, minorities, and the poor. Although risk assessment methodologies vary, most existing approaches ignore the differential risks and costs faced by urban communities, particularly central cities. Moreover, they generally overlook the implications of environmental regulations for housing affordability, housing preservation, and inner-city economic development, giving policymakers an incomplete and potentially inaccurate picture of regulatory impact.

The Clinton administration is reassessing many of the techniques now used to set environmental, health, and safety standards. The President's 1993 Executive Order on Environmental Regulation (E.O. 12866) directs Federal agencies to improve their risk analysis tools. It requires the agencies to adopt regulations only after determining that the benefits justify the costs, that the best available data have been used, and that the rules have been developed according to sound regulatory principles, such as performance standards and market incentives. E.O. 12898, discussed earlier, offers a good starting point for marrying urban risk analysis with the administration's larger efforts on regulatory reform. As noted, E.O. 12898 requires that Federal agencies assess whether Federal actions impose disproportionately numerous or adverse health and environmental effects on minority and low-

income populations. This order was not intended to require a comprehensive urban risk analysis but does require agencies to consider the differential effect of Federal actions on poor and minority communities.

The vast majority of environmental problems in urban communities, however, result not from current Federal policies and programs but from the complex forces of poverty and discrimination. Therefore, E.O. 12898 does not address the extent to which low-income and minority families and central-city communities may bear an inordinate share of the cost of environmental protection.

Many diverse efforts are under way to reexamine the way environmental risks are defined, measured, and managed. They include risk-based decisionmaking for problems (such as underground storage tanks), use-based cleanup standards (for brownfields), health-based standards (for lead and other health hazards), more cost-effective cleanup technologies, prioritized lead hazard reduction, flexible drinking water testing requirements, and area-wide conservation/urban planning to protect wetlands and endangered species. These efforts reflect a growing sensitivity to the impact on urban areas that should be supported and strengthened.

Allocation of Costs

If implementation of a desirable environmental action imposes a significant cost burden on the poor or on inner-city communities, policymakers should ask not only whether adequate public funds have been allocated to ameliorate the burden but also whether less costly strategies can be used to accomplish the essential environmental objectives. The issue of who pays for environmental protection is, ultimately, at the heart of the debate. All environmental mandates impose costs, many of which are borne by commercial and industrial sectors of the economy. Urban advocates should be particularly concerned if these costs are allocated in a way that seriously impedes the pursuit of other important urban policy goals.

In *Breaking the Vicious Circle: Towards Effective Risk Regulation*, U.S. Supreme Court Justice Steven Breyer argues that many regulatory agencies have "tunnel vision," single-mindedly pursuing a goal to the point at which they cause more harm than good. Justice Breyer describes this tendency as "going the last mile" or "the last 10 percent." (Breyer, 1993.) For example, if a regulation insists on such high cleanup standards that contaminated sites are simply abandoned by the owners, it undermines the very goals it was intended to promote. Although disadvantaged communities should be expected to bear a reasonable share of the cost of protecting the environment and to promote environmentally sound behavior, rarely has the issue of a disproportionate burden upon poor people been adequately addressed. The impact of environmental mandates on housing cost and housing affordability is of particular concern. Preserving the dwindling stock of affordable rental housing, increasing homeownership opportunities for low- and moderate-income families, and opening up suburban neighborhoods to a wider range of income levels are critical public policy goals that should not, and need not, be sacrificed to environmental objectives.

Many early environmental mandates — the Clean Air Act, the Water Pollution and Control Act amendments, and the Resource Conservation and Recovery Act (RCRA) of 1976, among others—imposed costly standards and practices but were generally supported by massive commitments of Federal funds. In the 1970s and 1980s, Congress provided substantial funding to implement these mandates. However, beginning in the late 1980s, Federal support dwindled, while State and local spending to meet federally mandated requirements for drinking water and sewage treatment rose dramatically. By

1990 Federal support for pollution control had dropped to 30 percent of total spending, with local spending on water supply systems increasing 3 percent annually. Local solid waste expenditures, driven by RCRA requirements, have risen more than 10 percent annually. State and local governments, in turn, pass most of the costs through to residential property owners in the form of increased property taxes, special assessments, or user fees. Whether financed through property taxes or user fees, solid waste treatment costs, which have been one of the fastest-growing components of shelter costs, are billed directly to residents.

Although the majority of American households can afford these costs, the current method of funding clean water systems and solid waste removal may seriously endanger the low-cost housing stock in some communities by increasing the amount low- and moderate-income families pay for housing, causing deferred housing maintenance, encouraging disinvestment, and increasing the costs of rehabilitation. Central cities with thousands of lower income families concentrated in economically marginal multifamily properties face tremendous pressures in trying to meet these costs. Older apartment buildings, which often serve low-income populations, are especially vulnerable, because there is no technically feasible way to submeter water to encourage conservation, and little money is available to repair inefficient plumbing systems. For example, in New York City, where water and sewer charges may reach $800 a month per apartment, rising fees are believed to be a major factor in the recent dramatic rise in tax arrears and foreclosures. Lower income families that already have unaffordable rent burdens face substantial increases; apartment owners who cannot raise rents may allow housing to deteriorate; and rehabilitation of older urban housing for lower income families may be discouraged.

When the burden of unfunded Federal mandates has the potential to endanger poor families and distressed communities in this way, housing providers and urban advocates have a responsibility to work with environmental protection agencies to reallocate costs or provide subsidies to at-risk households, property owners, or neighborhoods. For example, it might be possible to impose water and sewer mandates statewide, so that costs could be spread across the full range of income levels. User fees or property tax increases might be calibrated to protect low-income families and affordable rental properties, or Federal assistance might be targeted to help finance infrastructure improvements for lower income housing or in communities with high concentrations of low- and moderate-income populations.

Environmental regulations may also affect the cost of new housing development at the urban fringe. Requirements for environmental impact reviews—in NEPA and corresponding State statutes—and ecological mandates such as wetlands regulation, the Endangered Species Act, and the Clean Air Act may reduce the total supply of land available for development. Thus, even if the costs of delay and uncertainty imposed by the regulatory process are minimized, environmental mandates may increase land costs and thereby help to raise the price of suburban housing.

If the impact is significant, environmental regulations may make suburban communities less accessible to moderate-income families, reinforcing income exclusion and reducing homeownership opportunities. Because the benefits of the environmental protection programs are clear but the real costs are hard to quantify and isolate, it is difficult to articulate and acknowledge the public policy tensions that may exist. Once identified, however, strategies that maximize environmental protection while promoting housing affordability can be devised. For example, the inclusionary zoning requirements that incorporate moderately priced units into new suburban housing developments and the comprehensive growth

management efforts now in effect in Oregon could serve as models for future Federal and State efforts.

For older, inner-city housing that requires repair or renovation, environmental regulations regarding lead-based paint, asbestos, and historic preservation can significantly increase costs, perhaps making much-needed rehabilitation financially difficult in some circumstances. Some reports suggest that compliance with these requirements may increase housing rehabilitation costs by 15 to 20 percent. It is not uncommon for advocates of a particular mandate to argue that the cost of compliance is modest, but the cumulative impact of many mandates on the feasibility of housing investment can be substantial.

Environmental mandates generally apply to both publicly assisted housing stock and privately owned, unassisted stock. However, the resources for financing compliance differ substantially. Costs for federally assisted housing are usually financed from available program resources, with the result that fewer units can be produced out of a fixed budget. Regulatory cost burdens on privately owned rental housing, however, are not cushioned by the availability of subsidies or public financing. For example, although substantial funds are available for reducing lead hazards in HUD-assisted housing, public funding generally is not available to private-sector property owners. Thus these private housing providers, including nonprofit organizations, face higher costs to rehabilitate inner-city housing for low-income households or to preserve the existing stock of low-cost rental housing. Because low-income renter households have limited purchasing power, private housing providers cannot pass on the costs to renters, yet these organizations generally have little financial cushion or room for error in projects to renovate or preserve older rental properties. Therefore, unless public subsidies are available to cover all or part of the cost of compliance, environmental requirements may result in reduced property maintenance and delayed repair or in the loss of affordable rental units from the existing stock.

Because the impact on the existing affordable housing stock may be severe, special care should be used when applying environmental mandates originally devised for new housing construction to existing housing. Policymakers should require compelling evidence of health or environmental risks before imposing new requirements on the fragile stock of affordable housing. They should also consider interim standards for existing housing (without sacrificing health and safety) and implement phased strategies that can preserve the affordable stock as well as protect residents until adequate public resources are available. Ultimately, public subsidies may be necessary to achieve the goals of environmental health and safety without incurring further losses to the dwindling stock of affordable rental housing.

The issue of cost allocation also affects HUD's ability to carry out its mission of assisting vulnerable populations. With the Department's resources declining in real terms for the foreseeable future, the cost of meeting housing-related environmental mandates directly reduces the number of new units that can be subsidized. As a result, vulnerable populations will suffer in terms of both health and housing, because HUD's diminished resources will not go as far as they once did. Lead-based paint is the primary environmental challenge facing HUD directly. A recent departmental analysis indicates that, although health benefits are expected to justify the expenditures, the immediate annual cost of lead hazard reduction mandates for HUD's assisted housing stock will approach $460 million. Congress has clearly determined that, with regard to lead-based paint hazard abatement, HUD-assisted housing should lead both the public and private sectors, serving as a model for environmental health and safety. Before holding publicly assisted housing to the same high standard in other areas of environmental regulation, HUD needs an opportunity to

establish priorities that address the most significant environmental problems first, within existing resource constraints.

Toward an Urban Environmental Policy

The time has come to change the way this Nation develops both its urban and its environmental policies. Urban and environmental interest groups, advocates, and legislative committees must begin to consider crosscutting issues that, until now, have been of only marginal interest to their respective organizations and memberships. Cities, nonprofit developers, and urban advocacy groups must recognize that environmental health and protection of natural and built environments are an integral part of their agenda. The environmental advocacy community must look to State housing and community development agencies, local zoning and planning agencies, community nonprofit organizations, and HUD for help in the development of new environmental protection strategies that can work more effectively in urban areas.

In recent years some private development interests, such as homebuilders and the lending community, have become increasingly active in the environmental policy debate, seeking changes to mitigate what they consider to be regulations that harm or impede their industries. Examples include opposition to wetlands and endangered species takings as well as lender liability under Superfund. These industry groups have become major players in policy debates on environmental mandates and undoubtedly will continue to be aggressive in representing and promoting their interests in the policy arena. However, their participation has generally been a reactive one prompted by—in their view—the undesirable impact of existing environmental mandates. This type of protective response by individual business groups cannot substitute for full and balanced urban involvement in the formulation of environmental policy. Parochial, industry-supported restrictions on wetlands regulations or overly broad limitations on lender liability are not necessarily in the best interests of the developers' constituency.

Recently, EPA and environmental advocacy groups have begun to work with minority and low-income groups on the issue of environmental justice. This long-overdue effort represents an important first step, but concern for environmental justice does not constitute a comprehensive urban environmental policy. In fact, there is a danger that misapplication of the principles of environmental justice could result in greater economic and environmental deprivation for the urban poor. For example, unless adequate strategies are developed to address the high cost of environmental cleanup in central cities (many promising EPA-sponsored efforts are under way), rigid application of the principle that central-city brownfields must be cleaned to the extent that they present no greater exposure to pollutants than suburban greenfields may block opportunities for environmental cleanup as well as for new housing, jobs, and economic redevelopment in central cities.

Clearly, the full range of urban interests must participate in the formulation of environmental policies and must also make environmental concerns an integral part of their agenda. Community and economic development programs cannot ignore the needs of environmental restoration and protection. Those who craft publicly assisted programs for housing rehabilitation and development have a responsibility to be concerned not only with production costs but also with the living environment of assisted families. To achieve these environmental objectives, urban interests that have generally been absent from the formulation of urban policy must begin to consult more systematically with environmental advocates.

The Federal Government's approach to the problem of lead paint poisoning provides a model for future efforts to address urban environmental challenges. Childhood lead-based

paint poisoning is an environmental health problem that occurs within a housing context. It is most prevalent in older low-income housing, in central cities, and among the poor and minorities. Therefore, there is an inevitable tension between housing affordability/preservation and the protection of children's health. These issues are explored in the article by Nick Farr and Cushing Dolbeare.

The Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X) recognizes that solving the problem of lead-based paint requires the coordinated efforts of housing and health officials at the Federal, State, and local levels. Under Title X the only environmental health legislation jointly developed by housing, health, and environmental committees in Congress—HUD, EPA, and the Centers for Disease Control and Prevention (CDC) play complementary roles. Most lead-based paint problems occur in privately owned housing, which is not normally subject to Federal regulation. HUD's participation in the development of lead regulations has been critical, because both the CDC and EPA lack expertise in the operations of the private housing market. In addition, most lead-based paint abatement activities are carried out by the local agencies, nonprofit organizations, and private owners that generally conduct housing rehabilitation and own and manage the stock. HUD is the only Federal agency that has a close working relationship with these providers. The Department also must address lead paint hazards in federally assisted housing, where it has a special responsibility to ensure that the regulations protect children while also permitting the continued economic viability of assisted housing. Further, Federal coordination has stimulated cooperation and coordination among State and local housing and health agencies.

In effect, Title X dictated what has become a successful marriage between agencies that approach the lead paint issue from different perspectives. For example, one important Federal responsibility is to prepare technical standards and procedures for identifying and reducing lead-based paint hazards. While all of the participating agencies are required to consider health, financial, and technical factors, each agency's mission and perspective affects its approach to these issues. In this process, HUD is concerned about cost as well as health effects, seeking measures that will be perceived by the housing industry as sensible, affordable, and manageable. EPA's and CDC's primary concerns are with the environmental and medical soundness of hazard control measures. All perspectives are clearly needed. The recent report of the Task Force on Lead-Based Paint Hazard Reduction and Financing is an important effort to balance and reconcile these goals. (U.S. Department of Housing and Urban Development, 1995.) By working together, the public health and housing constituencies have developed a comprehensive but realistic strategy for lead hazard control, which a number of States are now enacting.

A New Urban Environmental Role for HUD

HUD is undergoing a profound and long-term transformation in both its mission and its operations. In the future, categorical programs will be consolidated and more decisions regarding housing and community development tradeoffs will be made at the local level. A smaller and leaner HUD, freed from managing a multitude of small, special-purpose programs, will have an opportunity to stake out a new role in the development and implementation of urban environmental policy. By facilitating constructive dialog between urban and environmental interests, the Department may be able to help fashion a consensus for new approaches that can resolve many of the existing strains and tensions. In addressing urban environmental issues, HUD can and should perform three important and closely related roles: advocate and "broker" for urban interests, technical resource and environmental educator, and more effective and aggressive program administrator.

To perform the first of these roles, HUD should speak with a clear, strong voice within the Administration and to Congress regarding the environmental policy perspectives of cities, low-income residents, housing markets, and urban development. The Department should stay in close contact with its varied constituencies regarding developing environmental policies and should participate in major rulemaking and legislative initiatives that might have significant urban or housing impacts. In assuming this role, HUD must take great care not to be influenced by individual business interests that might be affected by existing or impending environmental policies. Rather, the Department must act as an "honest broker" within the Administration, accepting or rejecting individual interest groups' arguments in favor of a broader perspective that reflects the urban public interest while maximizing protection of the environment.

HUD should also become a reliable source of data and research for groups whose constituencies are affected by impending environmental regulations and legislation—a center for urban environmental expertise. Many urban constituencies find the problems addressed in environmental legislation and regulations too technical or esoteric for their full participation. These groups have neither the expertise nor the resources for adequate exploration of such issues as pollution hazard levels and environmental risk assessment. In this role, HUD would undertake scientific research and analysis, disseminate existing studies, and demonstrate approaches or techniques suggested by others' research. Although the Department has performed this role for particular subjects, such as lead paint and radon, it would need to devote more of its limited research resources to urban environmental research than it has in the past.

Finally, as HUD permits State and local governments to exercise greater flexibility in program implementation, it should work with EPA to develop performance measures as well as technical assistance and guidance materials that help and encourage communities to incorporate environmental protection into their housing and neighborhood revitalization efforts. Examples of actions that HUD is now carrying out, or has under active consideration, include providing guidance to local governments on brownfields redevelopment strategies, developing guidance on controlling urban sprawl, and developing tools for use by local housing authorities conducting their own comprehensive environmental assessments. The Department must also ensure that all publicly assisted or insured housing units meet high standards of environmental protection.

As HUD becomes more involved in the formulation of national environmental policy, it must be guided by principles that not only reflect its historic commitment to cities, low-income residents, affordable housing, and minorities but also contribute to more rational and effective environmental protection. We propose for consideration nine principles that could guide HUD as it assumes a more active role in the environmental policy debate:

- HUD's fundamental mission is to ensure decent, safe, and sanitary housing in a suitable living environment for all Americans. All HUD programs and resources should contribute to improving the quality of the urban environment, promoting environmental amenities, and eliminating housing and community environmental hazards and their blighting effect, especially for the poor and minorities. To accomplish this objective, environmental goals and programs should be fully integrated into the formulation and implementation of all of the Department's programs.
- HUD has a special responsibility to ensure that publicly assisted housing meets high standards of environmental protection and serves as an example for the private market regarding environmental protection. Fulfilling this commitment requires a careful and balanced analysis of the degree of HUD involvement; the nature, immediacy, and

certainty of environmental risk; the population served; and the costs and available resources. Where resources are limited, HUD should establish prioritization strategies that address the most pressing needs first.

- HUD should be an advocate for Federal, State, and local environmental policies that do not force low- and moderate-income families to bear excessive costs. Public strategies and programs for addressing environmental problems must maintain housing affordability. Nevertheless, Federal, State, and local policies should encourage everyone, regardless of income, to support and comply with environmental mandates.
- Environmental risk-analysis research necessary for setting hazard levels, as well as policies based on that research, must consider potentially disproportionate impacts on low-income families and central cities. When such impacts are identified, HUD should advocate the adoption of standards and policies that can achieve a balance between reducing risk and minimizing costs and other negative impacts on the poor and on central cities.
- HUD should press for Federal, State, and local land use policies that will ensure that potentially hazardous land uses are not sited in low-income neighborhoods and that new housing is built only in environmentally sound locations.
- Adequate public resources should be made available to ensure that conditions in lower income and minority communities meet fundamental standards of environmental quality.
- HUD should support Federal, State, and local efforts to develop comprehensive planning and growth management programs, as well as regulatory systems that protect environmental resources and enhance the built environment without an excessive increase in housing costs or limitations on urban economic growth.
- The design and implementation of environmental programs that affect the built environment should, to the maximum extent possible, coordinate with, or work through, existing public and private housing finance, construction, housing services, and community development systems. Consistent with this principle, HUD should support the design of legislative strategies and the provision of adequate resources to achieve the full integration of environmental priorities into local community development goals and programs.
- Maximum effort should be undertaken to develop programs and policies to abate or avoid environmental hazards that discourage reinvestment or redevelopment in urban areas.

As both urban housing and environmental programs undergo intense scrutiny and reexamination, it is natural that advocates and beneficiaries of existing programs will seek to preserve much of the status quo. However, this should also be a time of opportunity and innovation in which common interests will be identified and possibilities for mutual support and collaboration will be pursued. The articles in this issue of *Cityscape* raise serious concerns about the interaction of environmental protection and housing and community development policy. Clearly, these issues deserve far more attention, research, and policy consideration than they have received to date. While our intent is to be provocative, we hope we have also been constructive. Above all, we hope this volume represents the beginning of an ongoing dialog between the urban and environmental policy communities.

Authors

David Engel is director of the Affordable Housing Research and Technology Division in HUD's Office of Policy Development and Research. He previously served as director of housing for the Office of Economic Opportunity and assistant director of the National Solar Heating and Cooling Demonstration Program. He also has worked on the Douglas Commission and on the National Commission on Regulatory Barriers to Affordable Housing. Mr. Engel holds a B.A. from Hunter College and an LL.B. degree from Rutgers University.

Edwin Stromberg is program manager for the environmental impacts research and demonstration program in HUD's Office of Policy Development and Research. His current focus is on brownfields research and policy development. He has also served as program manager for the radon research and demonstration program. Previously, Mr. Stromberg developed and managed research on the public housing drug elimination program, on Project Self-Sufficiency, and on neighborhood preservation. He holds a B.A. and M.A. in Political Science from the State University of New York at Buffalo, and is ABD in Political Science from the University of Illinois.

Margery Austin Turner, a nationally recognized expert on urban housing markets and housing policies, is a principal research associate with the Urban Institute. She served as Deputy Assistant Secretary for Research, Evaluation, and Monitoring in HUD's Office of Policy Development and Research from 1993 through September 1996, directing research on a wide range of housing and community development issues. Ms. Turner's recent work has focussed on the role of discrimination and segregation in urban housing markets. Her other work includes assessments of specific housing assistance programs, as well as broader analyses of the impacts of tax benefits, financing assistance, and subsidy mechanisms. She received a B.A. in Government from Cornell University and an M.A. in Urban and Regional Planning from the George Washington University.

Note

1. Although the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) encourages regional transportation planning, the actual connection to urban growth planning, housing affordability, and environmental protection issues remains weak.

References

Breyer, Steven. 1993. *Breaking the Vicious Circle: Toward Effective Risk Regulation*. Cambridge, MA: Harvard University Press.

U.S. Department of Housing and Urban Development. 1995. *Putting the Pieces Together: Controlling Lead Hazards in the Nation's Housing*. Report submitted by the Task Force on Lead-Based Paint Hazard Reduction and Financing. Washington, D.C.

R. JAMES CLAUS, PhD
22211 SW Pacific Highway
Sherwood, OR 97140

March 8, 2002

Representative Earl Blumenauer
3rd District of Oregon
1406 Longworth Building
Washington, DC 20515
Fax: (202) 225-8941

To the Honorable Earl Blumenauer:

I recently spoke with your Legislative Director, James Koski, about the Community Character Act and your support of HB1433. I am concerned about the specific linkage between the block grant funding in the Act and implementation of a Legislative Guidebook funded in part by Housing and Urban Development, with contributions from other federal agencies, and developed by the American Planning Association.

Before I specifically say why I dislike this law, let me make two points clear:

One, I am an environmentalist with a strong record of productive activism. I include for your reading two articles, one in a San Francisco paper and the other in the Reader's Digest, about a long struggle in which we were deeply involved over protecting national wildlife refuges. Additionally, a few years ago I approached Sherwood Mayor Walt Hitchcock with an idea for a comprehensive stormwater management plan, and we worked with the US Fish & Wildlife service further developing the idea. Thanks to the aid of Senator Mark Hatfield, that idea became a reality in the creation of The Tualatin National Wildlife Refuge.

Two, I have a strong record of rehabilitation of historic buildings and urban renovation. The current Sherwood City Hall was not too long ago nothing more than a dilapidated building that was a blemish on the historical downtown area of Sherwood. We purchased the building and spent a small fortune refurbishing it, then sold it to the City (at its request) at a far-below-market price (it actually was a partial donation to the City). We then rebuilt the historic Robin Hood Theater to full functionality. We turned down two $485,000 cash offers for the theater and instead sold it to the City for $200,000 (again, a partial donation to the City). We did this in order to enhance Sherwood's historic district. Finally, my family donated nearly five acres of land for the creation of Snyder Park in Sherwood (I believe we are the only family that did so of free will and without getting anything in return). In fact, I have spent a lifetime remodeling older homes to enhance the urban core. In the many years since I was a student at Stanford, I have made my living to a large extent by remodeling houses. I believe urban renovation and renewal is good for architectural diversity.

When we moved to Oregon, I was in extremely dire financial conditions due to the lawsuit at Kesterson (see enclosed articles referenced above), and the only homes I could buy were older homes that needed to be remodeled, frequently with seller financing. Slowly we built back a modest nest egg for our family. We moved into an old farm house on Highway 99W in Sherwood that, at the time we moved in, had neither public water nor sewer. It was located on property zoned for commercial use. When I had recovered financially sufficiently to be able to borrow money again, I sought a loan on the property. But Sherwood had an amortization policy that impacted my home. Because it was being used differently than it was zoned, it was deemed nonconforming. Amortization meant it would be considered "legal nonconforming" for a period of time; then it was to become "illegal nonconforming" and would be required to be taken down at my expense. After reading Sherwood's nonconforming use statute and amortization policy, the bank informed me there would be no long term loan. It was too much of a risk. I tell you this because Sherwood's amortization policy was exactly like that which is advocated in the Legislative Guidebook.

I have spent my life making a real-world difference in protection of the environment and in renewal and revitalization of urban space, two of the goals commonly touted by "Smart Growth" supporters. My experience in land use planning and in working under land use regulations is long, and I will not detail it for you here. But suffice it to say, I am not writing to you as an inexperienced, wild-eyed idealist, but rather as someone with many years' of experience working in the trenches, with a solid understanding of how these things actually get done.

As written, the Community Character Act you are apparently supporting will give the American Planning Association a chance to use federal credibility and federal funding to promote its members and create jobs and job security for them, through the creation of a radically unconstitutional land use planning system. In case you doubt that kind of promotion will occur, I have sent separately to your aid a whole series of government web site links to the Legislative Guidebook that, in my opinion, amount to an improper, if not illegal, apparent endorsement of the book.

You are taking a seriously regressive step if you support the Community Character Act without segregating it immediately from the Legislative Guidebook. Over and over, the book recommends violation of federal rule, regulation, and law under which federal agencies are required to operate. Under such a system, someone like me, who renovates old buildings, would jump right out of that market. Were these statutes on the books, I would not touch a nonconforming building, as we have done in Newberg and numerous other cities, even if I could find private financing, because the risk would be too great. In addition, no public financing would be available, and there would be no institutional financing from a proper organization. That stock of housing would be moved out of both the investment and the living portfolios, resulting in urban deterioration on a grand scale.

The supporters of this Legislative Guidebook are attempting to convince Congress that it embodies a new approach and that the interference with civil rights that it espouses will bring about nothing but positive benefits for society. This is simply not true. Nothing in land use planning, and nothing in this Guidebook, is a new idea. It is all repackaged ideas that have been tried before. For example, "mixed use" is nothing more than a repackaging of the old "company town," in which housing was built next to employment. It is an idea that has been around at least since colonial times.

Land use planning is a good idea, and I support it, but rather than pretending we ought to support the "new ideas" offered in the Legislative Guidebook, we should be looking at what our goals are, and what prior efforts have a track record of success in reaching those goals. Through numerous court cases, the Supreme Court has handed down guidelines for land use regulation that back that up, requiring regulations that interfere with civil rights be based on provable benefits rather than on unproven assertions and opinions.

We must face up to a simple question about the implementation of land use planning. Will it be done with a modicum of respect for people's constitutional rights? Or will it be done in a nearly totalitarian fashion, allowing a planner, who is poorly (if at all) trained in the law, to retroactively and procedurally take property and business for no other reason than that the planner does not like it? Will we have a system of land use regulation, in which administrative due process of law means sitting in front of these planners and being told that the law is something which is, in fact, contrary to numerous Supreme Court cases? Allowing these regulations to be passed into law with federal money and blessing, and then expecting the courts to sort out the civil rights issues would be a tragic abuse of the citizens' civil rights. The majority of time people are not going to have the money to fight an unconstitutional regulation, because the cost of fighting it will be greater than the value of the right they are losing.

In addition to disregard for 5th and 14th Amendment concerns for private property and due process rights, the Guidebook contains a serious attack against 1st Amendment protections for speech. It advocates severe restrictions on commercial speech displayed on signs, both on-premise and off-premise, in spite of the several Supreme Court cases cautioning that commercial speech cannot be arbitrarily restricted in the absence of a substantial state interest that can be advanced by no other means. Planners are limited in their authoritarian power to narrowly crafted time, place, and manner and content-neutral regulations, from which they can prove a substantial benefit. Furthermore, the Supreme Court has placed this burden of proof on the government. The Guidebook completely ignores the fact that the 1st Amendment protects commercial speech and that if the government violates civil rights in this manner, it is liable for plaintiff's attorneys fees and costs.

The use of police powers to enforce land use regulation is the only instance in which everyday behavior is criminalized at the whim of a government official. You must put some barrier to protect our civil rights, so that when government officials abuse their

authority, basing retroactive and regulatory takings and censorship on their opinions and tastes rather than on provable public benefits, they face personal liability. I hope I can count on you to thus watchdog our civil rights.

Sincerely,

R. James Claus

cc: Karl Rove
Congressman Earl Blumenauer
Congressman F. James Sensenbrenner, Jr.
Senator Gordon Smith
Senator Ron Wyden
Thomas M. Sullivan, Chief Counsel for Advocacy, US Small Business Admin.
J. Matthew Szymanski, Special Counsel, House Committee on Small Business
Harry C. Alford, President and CEO, National Black Chamber of Commerce
Radwan N. Saade, Economist, Office of Advocacy, U.S. Small Business Admin.
David G. Bartel, Chief of Staff, Congressman Stephen Horn
James Koski, Legislative Assistant, Congressman Earl Blumenauer
Major L. Clark, III, Assist. Chief Counsel for Procurement, Office of Advocacy, U.S. Small Business Admin.
Roger Pilon, VP for Legal Affairs, CATO Institute
Robert S. Corzine, The Heritage Foundation
Todd F. Gaziano, The Heritage Foundation

Analysis of Chapter 9 of the Legislative Guidebook

Introduction

The Legislative Guidebook is presented as a revolutionary breakthrough that will modernize state enabling statutes. It claims that most enabling statutes have not been modernized and, therefore, the inerrant guiding hand of APA is needed to bring the statutes up to date. It ignores the fact that ever since enabling statutes and zoning were first passed and used, the federal courts have steadily modified them and brought them under Constitutional constraint.

Considering the potential impact of this Legislative Guidebook, it seemed prudent to take the time to at least partially analyze one chapter, both as to its syntax and as to its substance. It would be virtually pointless to go through the entire document from top to bottom, because the kind of errors that we shall point out that occur in construction in just this one chapter are ubiquitous. But before blindly approving and implementing the statutes recommended in this manuscript, a careful review should be done to discover the duplicity, and the arbitrary and capricious nature of the document. It is a piece of work typical of an agenda-driven group that believes its intentions are so good it does not need to be constrained by anything such as civil rights.

This analysis is by no means complete. It is a partial overview done solely to convey some flavor of the drafting and grammatical problems that permeate the document.

Regulation of Critical and Sensitive Areas and Natural Hazard Areas

Page 9-3: *"If the regulation is designed to limit contaminant transport to the water resource, the regulation must identify which contaminants are being regulated, and arguably provide a basis for the regulation's purpose. ... The delineation must reflect current analytical technique and not, as has often been the case, be based on best guesses ..."*

Comment: In other words, "It is time to admit we cannot get away with doing things as we have in the past, just 'guessing' when it comes to data. When making up your regulations, be sure to carefully describe what you are regulating, and it might be a good idea to come up with some kind of good reason for the regulations." Of course, with a squishy recommendation like this, we are back to "best guesses."

Page 9-4: *"Natural hazard areas ... include those portions of the community that pose risk to the built and natural environment and public safety from a known or potential natural hazard or disaster."*

Comment: "Portions of the community" sounds like groups of people, rather than elements of the natural or built environment. Are they advocating classifying arsonists,

thieves, polluters, or criminals as natural hazards? After all, they pose a risk to the built and natural environment or public safety.

Page 9-4: *"One reason why floodplain ordinances are important is that property owners in a floodplain cannot obtain insurance under the National Flood Insurance Program unless the local government first adopts floodplain regulations that satisfy or exceed criteria established by the Federal Emergency Management Agency."*

Comment: Finally the APA acknowledges that in order to get federal funding you must play by federal rules. It would be appropriate here to cite *State of South Dakota v. Volpe* [353 F.Supp 335, (D.S.D. 1973) or *Eller Outdoor Advertising Co. of Arizona v. City of Scottsdale* [579 P.2d 590 (Ariz.Ct.App 1978), to impress on local governments the seriousness of taking federal money, or trying to obtain federal money, and not playing by the federal rules. It is good to see that APA understands this to some degree. However, it is an unfortunate perversion of the principle that APA is only selectively mentioning this principle – urging local governments to designate flood plains in order to get federal insurance – when it serves to increase regulation and strengthen the position espoused by APA.

Page 9-5: *"Alteration of Land Form" means any human-made change in the existing topography of the land, including, but not limited to, filling, backfilling, grading, paving dredging, mining, excavation, and drilling;"*

Comment: Any agriculturalist will be interested to learn that under these new regulations, if he land planes his property or uses heavy disking equipment, he has "altered" the land. This kind of sloppy definition, which literally includes any and all activities, subjects all human activities to the agents of this code. Unless APA is looking to put citizens in jail en masse for everyday activities as simple as repairing sprinkler systems or tilling their garden plots, these poorly-written definitions are so broad in scope that they serve no purpose other than to confuse us and probably irritate the U.S. Supreme Court.

Page 9-6: *"'Best Management Practices' means the process of minimizing the impact of a nonpoint source pollution on receiving waters or other resources, including, but not limited to, detention ponds, vegetative swales and buffers, street cleaning, reduced road salting, and public education programs;"*

Comment: Good heavens! Does anyone who writes this seriously believe that these kinds of definitions belong in a police powers regulatory guidebook that can lead to both heavy monetary fines and jail sentences? Furthermore, the construction of this provision is extremely confusing, leading the reader to wonder if "Best Management Practices" means the process of minimizing the impact of a nonpoint source pollution on street cleaning, reduced road salting and public education programs. A few minor changes in sentence construction would have made the nonsense understandable: *"'Best Management Practices' means the process of minimizing the impact of a nonpoint source pollution on receiving waters or other resources, and includes, but is not limited to, the*

creation of detention ponds, vegetative swales and buffers; street cleaning; reduced road salting; and public education programs."

Page 9-6: *"'Critical and Sensitive Area' means lands and/or water bodies that: 1. provide protection to or habitat for natural resources, living and non-living;"*

Comment: First, "Critical and Sensitive Area" is a singular term, but in this phrase it is made the equivalent of plural terms ("lands" and/or "water bodies"). Is it an area of land containing one or more water bodies, or is it an area of land or a body of water? It is hard to tell because of the syntax error.

The kind of regulation this provision can lead to is evident in Portland, Oregon, which actually implemented regulations to protect the wildlife that lives in critical and sensitive natural areas in people's back yards. This wildlife includes pesky raccoons, cat-eating coyotes, disease-carrying rats, stinky skunks, and nasty opossums, all of which add nothing to the urban environment other than unpleasant road kill, potential for the spread of disease, and lots of work for the County Vector Control workers. Additionally, the regulations prohibit all but native plant species within 50 feet of the "body of water" (including dry creek beds), which makes illegal the planting of a vegetable garden or flower garden containing non-native plants. Furthermore, if a large tree falls in the back yard of a person whose home is within 50 feet of the "body of water," as often happens in winter storms in Portland, the tree has to remain on the property to provide "habitat" for the above mentioned critters. It is ironic that after centuries of attempting to rid urban areas of rats, Portland law now requires homeowners to provide them with "habitat."

Page 9-6: *"'Critical and Sensitive Area' means lands and/or water bodies that: ... 2. are themselves natural resources;"*

Comment: Portland also considers any spot of land that is not covered by a house – in other words, a back yard, a park, or an undeveloped lot in the middle of a neighborhood – to be "open space" and, therefore, a natural resource. Through the definitions process, these regulations can potentially be used to control all use of private property.

Page 9-6: *"Natural Hazard" means any condition or area, from any cause, designated in the natural hazards element of a local comprehensive plan as a natural hazard, including but not limited to: ... 9) forest fire, brush fire, or other such fire; ..."*

Comment: We know from an earlier passage that a natural hazard *"does not even have to be wholly natural"* (Page 9-3), and we know that a brush fire is defined as a natural hazard. So apparently, if you decide to burn brush, which all rural agriculturalists do in a process called "pruning," you have created a "natural hazard." A little time should be spent in this section listing the activities that are not intended to be regulated. Such overly broad regulations are at their best unintelligible, and at their worst oppressive.

Page 9-7: *"'Stormwater Management' means the process of ensuring that the magnitude and frequency of stormwater runoff does not increase the hazards associated with*

flooding, water quality is not impaired by untreated stormwater flow, and the integrity of riverine, estuarine, aquatic, and other habitats is not compromised;"

Comment: The construction of this sentence is extremely difficult to follow, leading on first reading to complete confusion. Adding the word "that" after each comma would have helped tremendously.

As to content, it begs some questions. Does "water quality" refer to quality of the drinking water supply, or quality of the water throughout the watershed in terms of ability for fish and/or other aquatic life to thrive or survive? What do they mean by the "integrity" of habitats? Existing integrity? Optimal integrity? Or some other standard? Furthermore, where is the provable benefit? For example, Portland is investing a lot of time and resources into stormwater filtration systems throughout the city, only to have the stormwater flow into neighboring jurisdictions that do not treat their stormwater. It is a tremendous, ideal-driven expense that achieves nothing because no inter-governmental cooperation has occurred. At the same time, Portland is able to violate the principles of its stormwater management plan in constructing its own projects. In a number of city parks, City officials have forced residents to accept off-leash dog area despite be warned that the dogs' feces would pollute the streams bordering the off-leash areas, which has come to pass. The City was also able to avoid the kind of enforcement other developers would have faced for the negative impacts on the streams caused by erosion during construction of a huge community center in a park during the fall and winter. Additionally, it was willing to wink at U.S. West's (the mammoth telephone service company) installation of an underground cable through an environmentally sensitive area without permits, causing serious degradation of the creek and environment. It took a five-year citizen-led battle to force the City to enforce its own oppressive code to the minimum extent. The point is, the regulations do not in reality protect the environment. When it is in the best interests of large corporations, government agencies, or their friends, to violate these regulations, the wording of the regulations is such that a way can be found to do it, and the regulatory burden ultimately falls solely upon the individual property owner or less-franchised developer.

Page 9-8: *"'Substantial Damage' means damage of any origin sustained by a structure whereby the cost of restoring the structure to its pre-damage condition would equal or exceed fifty percent (50%) of the market value of the structure before the damage occurred, regardless of the value of or actual cost of repair work performed;"*

Comment: This statement clearly demonstrates that APA are dull knives when it comes to economics. This is a good example of how the group throws around terms it does not understand to try to prove its wisdom. The fact is that on many custom-built structures such as signs, there is no "market value." People do not go around buying them. That does not mean, however, that they have no value – just that they have little "market value." APA has in this passage committed a gross misuse of a specific appraisal term. It is an extremely serious mistake, and anyone with any background in appraising would have immediately picked it up. Unfortunately, it is experts like these who were specifically barred from the drafting process.

Page 9-8: *"'Tidal Management' means the process of, and mechanisms for, ensuring that the magnitude and frequency of tides and wave action does not increase the hazards associated with flooding and/or erosion. Tidal management may include, but is not limited to, breakwaters, seawalls, the expansion or restoration of beaches, and the planting of vegetation to protect beaches and soil from erosion;"*

Comment: Apparently, APA cannot make up its mind on a core principle as simple as whether or not man ought to interfere with natural processes. On the one hand, we must protect nature by not interfering in natural areas by intruding on them with any kind of development. On the other hand, we must protect nature by stopping the natural erosion that occurs from inconceivable amounts of water beating upon the beaches, rocks and cliffs day after day. Perhaps the core principle is actually that environmental reasons should be given when necessary to bolster support for confiscatory and restrictive regulation of private property.

Page 9-9: *"Note that if a local government participates in the national Flood Insurance Program (NFIP), the NHAOD standards must comply with the NFIP regulations adopted by the Federal Emergency Management Agency."*

Comment: Again, APA clearly understands that you have to have federal clearance to get federal money. So why does APA not understand that same principle when it comes to local governments seeking federal block grants to implement regulations that violate the 1970 Rehabilitation and Removal Act, which prohibits amortization of non-conforming uses in lieu of just compensation?

Page 9-9: *"in a natural hazard areas ordinance, include a provision that any building or structure in an NHAOD that suffers substantial damage due to one or more of the natural hazards associated with the NHAOD shall be restored or repaired only if, and to the degree that, the building or structure, and the uses and activities conducted therein, comply with all provisions of the ordinance ..."*

Comment: Considering the broad definition of "natural hazard" this seems extremely harsh. Supposing a careless employee lost control of a small intentional brush fire, and it severely damaged the main milking barn in a long-standing dairy complex located inside a rapidly expanding urban area. The rest of the structures – the office, stalls, laboratory, milk bottling facility, worker housing, and minor barns remained in tact, but that one damaged building was important to the operation of the facility. Under this kind of regulation, the operation would be forced to either limp along without the critical building or quit altogether. The Legislative Guidebook recognizes that this harsh standard is "an exception to the normal rule on nonconforming uses" and that "it may be controversial." It is, no doubt, aimed at efforts to rebuild after floods or landslides in areas repeatedly hit with these disasters, but the language casts a much wider net.

Page 9-10: *"Where the boundaries of a CSAOD or NHAOD are in doubt or dispute, in any hearing, review, or appeal pursuant to Chapters 10 or 11, the burden of proof shall*

be upon the owner of the land in question to show where the boundaries should be located. While evidence and testimony challenging the boundaries may be submitted by a professional engineer, wetlands scientist, hydrologist, or geologist, the rebuttable presumption is that the boundaries of the CSAOD and/or NHAOD as identified on the zoning map are accurate."

Comment: In other words, it does not matter how convincing the evidence presented by the property owner, the government will be forced by law to insist that its own delineation of a boundary is correct and force the property owner to go to court to prove otherwise. This is the result of APA's rational relationships philosophy. Rather than basing regulations on fact, APA wants to base them on assertions and force property owners to prove the assertions are wrong. In many cases, this can cost the property owner more than the property itself is worth. In such a situation, most property owners will give up rather than fight, and the government succeeds in taking property rights without having to pay for them. If these regulations do not include a mechanism to protect the property owner, they will literally open the door for stealing property through the evidentiary and procedural process. If government employees and officials would be willing to accept personal responsibility for their actions in the form of punitive damages when they violate civil rights, private property owners could accept this kind of high-handed regulatory language. But government employees and officials essentially want sovereign immunity, which leads to abuse and loss of individuals' constitutional rights.

Transportation Demand Management

Page 9-11: *"Demand management offers a tool for addressing several issues. A principal (perhaps obvious) goal of TDM is to relieve traffic congestion by reducing the number of auto trips taken, vehicle trips during peak travel times, and the drive-alone rate."*

Comment: No mention is made here of how ineffective these huge efforts, where they have been tried, have been in meeting the purported goals. The efforts have only served to divert vast amounts of public resources away from roads, where they might have actually helped reduce congestion, to little-used public transit modes and bike lanes, which are a nice luxury, but for the average American are far less important than better maintained, wider roads for automobiles.

Page 9-11: *"TDM may also affect ... the opportunity cost incurred when land that could have been used for some other purpose is used for car-related infrastructure ..."*

Comment: This statement more clearly than any other shows an anti-automobile bias. APA sees nothing wrong with consuming land for light rail lines that serve far fewer people than would the same amount of land had it been developed into a road, and at far less cost. Automobiles and the mobility and personal freedom they have brought to this culture have added dramatically to our quality of life. The consumption of land for this purpose has not been a loss of value; it has been a worthwhile investment that has

enriched all Americans. Light rail transit, on the other hand, is a reversion to 19th Century transportation, a kind Americans happily rejected with the invention and affordability of the automobile. Light rail transit has failed to grow in popularity or even reach projected levels of usage. It has proven to be expensive and have little or no measurable benefit. Like heavy rail transportation systems, light rail transit is unpopular because it limits freedom of movement at the destination point, is inflexible, takes more time, and does not offer solitude or choice in personal entertainment (such as music). Additionally, both types of rail systems absorb huge amounts of government subsidies, and are, per rider, far more expensive than other more convenient transportation modes.

Page 9-12, in the footnotes: *"Illinois' TDM legislation, the Employee Commute Options Act, is subject to automatic repeal upon the repeal of the Clean Air Act Amendments."*

Comment: Obviously, it was the federal government's heavy hand and not the will of the local government that necessitated a TDM in Illinois, which is probably why this information was not included in the body of the text. If congestion had truly been the burden in Illinois that APA suggests, the people themselves would have been clamoring for such a plan.

Page 9-13: *"Another good illustration is Rhode Island's commuter parking facilities statute ..."*

Comment: Clearly APA likes Rhode Island's plan, but no mention is made of whether it is achieving its objectives. Likely, it isn't or APA would have shared that information. Ridesharing programs have a long history of failure. Nevertheless, APA thinks such programs are "good." Interestingly, Portland has a policy against commuter parking, or "park and ride" lots. The new west-side light rail line has no parking along it, and great pains were taken to be sure that the parking lot at the Oregon zoo, located on the light rail line, would not be used for parking by light rail riders. The reason? Automobile emissions contribute most to air pollution in the first few minutes of driving. Portland does not want commuters to drive a few blocks to a park and ride lot and then ride transit into downtown because doing so would undermine efforts to reduce air pollution.

Page 9-13: *"The principal advantage of a broad authorization is that it offers the greatest deal of flexibility in which endeavors the state might get involved in and allows a more direct means of incorporating 'cutting-edge' concepts into practice."*

Comment: First, the grammatical error in this sentence is embarrassing. Second, although several states' programs are mentioned, no mention is given to any successes. This is simply because there are none. All of the methods suggested for reducing auto trips have been tried in many different places, and all have failed. They are hardly "cutting edge." Because they are not successful at achieving the goals for which they were devised, they should not be further promoted as a method of achieving those goals. It is another example of APA's use of rational relationships to justify unconstitutional infringements on people's rights and an all-out assault on the American way of life, when there is no public benefit to be gained.

Page 9-14: *"One notable aspect of the Section is the authorization for local governments to designate transit zones and for employers to relocate their worksites to transit zones as a commute trip reduction measure."*

Comment: What are these people thinking? That in order to reduce the number of employees who come to work alone in their cars a company will happily pack up its entire business and relocate it to a transit zone? Does APA actually believe that *voila*, like magic, the business will carry on as if nothing had happened, only now all the happy employees who no longer have to drive will be riding the bus to work? If you were holding on to any doubt as to the lack of understanding the authors of this guidebook have about the business world and the preferences of the average American, I hope this one has swept that doubt away.

Page 9-14: *"This is in addition to typical trip reduction measures such as discouraging parking ... The intent of this provision is to direct employment into downtowns ..."*

Comment: One of the primary reasons people shop at strip malls is convenience: they can drive in on their way to or from work, park easily, hop out and get the variety of things they need in one quick stop, and continue on their way. One of the primary reasons people do *not* shop in downtown areas is inconvenience: unless they work downtown, it is not on their way to anywhere. Parking is difficult to find and parking meters make it even less desirable. A policy that claims to want to reduce auto trips by moving employment downtown, but which wants to further limit parking there, is a policy that is working against itself. You cannot move businesses to an area where they will face further struggles than they already face in attracting customers, then ratchet up the level of those challenges, and then expect people will choose to take a bus downtown to do their shopping rather than drive to the suburban shopping center right off the highway on their way home.

Page 9-15: *"encourage the location of ... encourage telecommuting ... encourage commuting ..."*

Comment: Think about that word "encourage." If you are picturing in your mind that the government will be a cheering section for transit use, bicycle use, walking to work, telecommuting, etc., you are not getting the right mental picture. What "encourage" means is active participation by government through the "carrot and stick" approach. The carrot is tax incentives, bonuses, and waivers of fees, for example. These things are wonderful for the corporation on the receiving end; Portland has done things like given major employers ten years without property taxes, or heavily subsidizing private construction projects through massive infrastructure improvements adjacent to the property, for example. But actions like these are very harmful to the general citizen. Residential property owners must make up for the tax losses to the local government, and important government services like police and fire protection or street maintenance suffer for funding when public money is used to buy corporate cooperation with the scheme of the day.

Page 9-15: *"encourage ... bicycle commuting ... ride sharing, carpool, and van pool modes;"*

Comment: Americans work more hours than just about anyone else in the civilized world. We have kids to shuffle to sporting events and practices and daycare, and we have workouts and shopping to do. We squeeze all these things into as few trips as possible, because when we get home we are dog tired, and we do not want to get up and go back out again. The automobile allows us to do all that. We can stop and shop on the way to or from work or school or daycare or gym or soccer field. But if we have to bicycle to work (setting aside for a moment the ridiculousness of a woman riding a bicycle to work in a dress or anyone riding a bicycle in a suit and smelling nice when they arrive at work), or ride in someone else's car or van, all of the rest of our personal time becomes even more difficult. When we arrive home, we still have to get into our cars and head out to take care of everything else.

Page 9-18: *"The rules and guidelines shall ensure consistency in trip reduction ordinances among regions and local governments ..."*

Comment: In other words, the state will be dictating to local governments the increasingly intrusive methods those governments will use in the futile attempt to reduce automobile trips.

Page 9-19: *"... the Department, and/or other state agencies adopt and implement other types of TDM measures ... including ... pricing strategies (road and bridge tolls), and land development regulations to foster bicycle/pedestrian and transit use;"*

Comment: I refer back to page 9-11, which reads *"A principal (perhaps obvious) goal of TDM is to relieve traffic congestion ...."* Again, we see this document working against itself. Road and bridge tolls do not reduce congestion; they slow traffic and bog it down. And when land development regulations *"foster bicycle/pedestrian and transit use"* that usually means streets are narrowed and lanes are reduced to provide for bike lanes and wider sidewalks, and other streets are lost for transit malls and light rail lines. When the buses stop to pick people up, traffic behind must stop and wait. When light rail trains cross the road, traffic must wait. When lanes are lost and narrowed, traffic moves more slowly. All of these "solutions" simply exacerbate the problem, and betray the true motives of their proponents. These people are not truly interested in reducing congestion. They are using people's anger about congestion as a tool to win support for their anti-automobile agenda.

Page 9-20: *"A trip reduction ordinance ... may not be adopted unless and until the local government has adopted a local comprehensive plan with a transportation element ..."*

Comment: This sort of statement is seen throughout the Legislative Guidebook. Several levels of complicated plans must be created and adopted to work these regulations into

place. All this required planning will provide wonderful employment opportunities for APA's members.

Page 9-20: *"A trip reduction ordinance ...shall not be inconsistent with the trip reduction ordinances of the: 1. other local governments in the region if the local government is within the jurisdiction of a [regional planning agency]; or 2. adjacent or contiguous local governments otherwise;"*

Comment: This policy will give neighboring cities control over each other's activities, and where they disagree pressure will build to create regional governments with regulatory authority, such as the Portland area Metro. The subsequent section goes into detail on the authority of the regional planning agency, and increases the power those agencies have.

Page 9-20: *"A local government whose proposed trip reduction was rejected pursuant to this paragraph may appeal the decision of the [regional planning agency] to the Task Force, which shall review the proposed ordinance ..."*

Comment: Reading further, you learn that this task force, which was explained on Page 9-17 to be 15 members representing a "balance" of state agency representatives, local governments, transit agencies, major employers' representatives, and the general public, will have the authority to accept or reject the proposed trip reduction plan (note the typographical error in the quote above, which simply says "proposed trip reduction" and omits the word "plan"). Let's look at what a task force as described here might look like:

- Three members from the state agency (undoubtedly all would be supportive of APA's approach to land use)
- Three members from local governments (these, too, would be supportive of APA's approach)
- Three representatives from transit agencies (naturally, they will want the most auto-restrictive and transit-supportive plan imaginable)
- Three major employers' representatives (major employers always seek to make friends in high places, so finding pro-APA representatives would be very little trouble)
- Three members of the general public (hand-picked by the state agency)

Clearly, stacking the task force in favor of a preferred outcome, or stacking it in order to do a political favor, would pose no problem. The make up of the task force has plenty of wiggle room for the state to even appoint a few known agitators so as to create the appearance of fairness, without jeopardizing the desired outcome. Where smart growth principles are already being applied, biased Task Forces such as these are being widely used and granted undue levels of authority. Their members are hand-picked and unaccountable to the public, and their existence is barely known.

Page 9-21: *"Though there are obvious benefits for a small employer to locate at a major worksite, there is a possibility that if a trip reduction ordinance is perceived as onerous by small employers located at major worksites, some such employers will move to separate, non-major, worksites, thus increasing sprawl. The best preventative measure is*

to adopt a fair and balanced trip reduction ordinance and to monitor the land market for signs of such a movement of employers."

Comment: In other words, we already know this method is anti-market, so be on the lookout for signs that market forces will kick in, and be prepared to modify your approach somewhat if you have to do so in order to suppress the market reaction to our heavy-handed regulatory approach.

Page 9-22: *"requirements for major employers and employers at major worksites to adopt and implement commute trip reduction programs ..."*

Comment: First, this assumes the employees will be interested in participating in the charade. Second, no mention is made of whether or not the trip reduction program must be successful, or at what level it will be considered successful. The fact that it exists is apparently sufficient. Third, this requirement adds tremendous costs to the business. It is, in effect, a large tax.

Page 9-22: *"a commute trip reduction program for employees of the local government"*

Comment: If the local government is a "major employer" (which it usually is), why must it have a separate set of regulations? By virtue of the fact that it is located in a major worksite and is a major employer, it should automatically be required to follow exactly the same rules as all other employers. The fact that APA creates a separate designation for local governments demonstrates the organization's view that its members are above the law.

Page 9-22: *"provisions for enforcement ... for the failure of a major employer or employer at a major worksite to implement a commute trip reduction program or to modify its commute trip reduction program as necessary. Such provisions shall take into account the nature, seriousness, and circumstances of the violation, whether there is a pattern of noncompliance, and efforts which are being made to achieve compliance;"*

Comment: "Enforcement?" "Seriousness?" "Violation?" It sounds as if these people are talking about hard-core criminals. This document actually recommends that businesses which fail to implement a commute trip reduction program that satisfies a group of 15 unaccountable, hand-picked and biased individuals, who likely know very little about business as a whole, should be heavily fined, and possibly jailed.

Page 9-23: *"Every major employer, and every employer at a major worksite, in a local government that has adopted trip reduction ordinance shall adopt and implement a trip reduction program. (a) A commute trip reduction program shall consist of, at a minimum: 1. designation of a transportation coordinator; ... 2. regular distribution of information to employees regarding alternatives to SOV commuting; 3. annual review of employee commuting; 4. annual reporting to the local government ..."*

Comment: Again, we see appalling sentence structure. Are these employers "in" the local government, or "located within the jurisdiction of" the local government? Has the local government "adopted trip reduction ordinance" or "adopted *a* trip reduction ordinance?" Setting that aside, it is noteworthy that the regulations will necessitate either hiring a program oversight specialist, contracting out the work to a firm specializing in that work, adding to the work burden of an existing employee or employees, or creating a new department in order to fulfill these new requirements. The cost will be enormous, and the payoff will be negligible, as has already been proven in unsuccessful trip reduction plan after unsuccessful trip reduction plan.

Page 9-23, 24: *"If a major employer or employer at a major worksite does not meet the applicable commute trip reduction goals, then the local government shall, after consulting with the employer, propose modifications ... and direct the employer to revise its program with [30] days to incorporate those modifications, or alternative modifications proposed by the employer that the local government determines to be appropriate. (d) Failure to modify the program ... shall constitute a violation of land development regulations ..."*

Comment: Now it gets worse. If the business is unable to do the impossible, that is, reduce commuter trips to a level that will satisfy the anti-automobile idealists who have no regard for the fact that everything that has been tried has failed, and that people will not be moved out of their automobiles because the benefits of the automobile for their quality of life are so great, then the business owner(s) will be fined or jailed or both.

Historic Districts and Landmarks; Design Review

Page 9-25: *"Design review regulations ... attempt to promote or establish community character by insuring that a certain architectural style or styles are followed (e.g., "look-alike" ordinances) or, in contrast, that architectural diversity is encouraged ("anti-look-alike" ordinances)."*

Comment: This is the kind of comical effort to control every detail of development that will occur in cities across the country if this Legislative Guidebook is allowed to encourage the manipulation of development down to the precise width of siding allowed (as in Portland), the precise shades of a limited palette of paint colors allowed (as in Malibu), and other such minutia. It is an arrogance that is unbelievable, and is demonstrated in the terminology recommended in page 9-26, which requires the issuance of a *"certificate of appropriateness"* before any development can occur.

Page 9-27: *"... the majority view in U.S. courts is that aesthetics alone is a proper purpose in land use regulation."* Citation in the footnotes refers to "Metromedia Inc. v. City of San Diego, *26 Cal.3d 848, 610 P.2d 407 (1980), rev'd on other grounds, 453 U.S. 490 (1981)"*

Comment: It is literally amazing the purpose for which APA will cite a case. That *Metromedia* supports regulating signs based solely on aesthetics is an astonishing statement. APA has simply chosen a case often cited by its opponents and found what it wants to find in order to portray the false impression of legal support for its view in favor of arbitrary, capricious and discretionary power. APA never admits that *Metromedia* was the bellwether case on signs because in it the Supreme Court reversed San Diego's aesthetics-based regulations and recognized San Diego was censoring speech. It was the beginning of the Supreme Court's recognition of the applicability of intermediate scrutiny or strict scrutiny in the regulation of signs. But leave it to APA to have the case holding something else. This kind of misinformation, of burying a cite, and of claiming legal authority should have set off every alarm bell on every attorney at HUD and prompted them to send this back to APA for revision.

In addition to this, we find two more typographical errors in this section: "the constitutionality of *an* redevelopment" and "beautiful as well as *health* ..."

Page 9-29: *"The Section provides the option to adopting state legislatures to authorize the regulation of publicly accessible interiors as well as the exterior features of buildings. ... Examples of states specifically authorizing the regulation of interiors include ... North Carolina."*

Comment: The audacity of APA to believe the state ought to be able to enter a building and dictate what goes on there is unfathomable, and the listing of examples, as if this means no new legal ground is being broken with this regulation, is unconscionable. Only in the footnotes does the Legislative Guidebook disclose that North Carolina's regulation only applies where the landowner gives consent.

Page 9-29: *"Section 9-301 below expressly authorizes planning moratoria ... giving local governments up to 180 days free from development ..."*

Comment: The language used here – *"free from development"* – betrays APA's view of development – that it is a pain in the neck, and that a moratorium on building is a welcome relief from it.

Page 9-30: *"'Contributing Structure' means a classification applied to a site, building, structure or object within a historic district signifying that it contributes generally to the qualities which give the historic district its historical, architectural, archaeological or cultural significance, but without necessarily being itself a landmark."*

Comment: Allowing a designation like this could restrict absolutely any kind of development or activity within a historic district. It covers just about anything.

Page 9-30-31: *"Exterior architectural features include: 1. natural and man-made features of the site that significantly affect the character or appearance of the site;"*

Comment: This defines trees, dirt, rocks, creeks or ponds, and possibly even scenic views as architectural features. It also includes parking lots, sidewalks, drainage systems, and lighting systems. By not clearly defining terms, vast opportunity is created for abuse.

Page 9-31: *"'Historic District' means a geographically definable area possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by physical development;"*

Comment: This definition makes everything a historic district. It does not say that the area must be defined as and formally declared a historic district. The definition says that if it is *"definable"* on the basis of the location or continuity of any sites, buildings, structures, or objects that share involvement in some past event (how far past, it does not say) or share some kind of aesthetic similarity (perhaps they were all built in a style common in the 1990s), it *is* a historic district.

Page 9-31: *"'Historic Landmark' means an individual property of historical, architectural, archeological, or cultural interest;"*

Comment: Again, APA demonstrates an amazing inability to define terms. According to this definition, by virtue of the fact that an individual property is culturally interesting (this could include a home with a collection of totem poles in the yard, or a home with the front yard designed with a marine theme, as is common in coastal towns), or architecturally unusual (as many homes are), it *is* a historic landmark, and no formal declaration is apparently necessary.

Page 9-31: *"'Historic Preservation Board' means any officer or body designated by the legislative body to review applications for and issue a certificate of appropriateness for ... all or specified proposed development in a historic district or of a historic landmark;"*

Comment: Keeping in mind that "historic district" and "historic landmark" are so poorly defined that they cover virtually anything, it is truly frightening that the legislative body could appoint a *single* individual to play God in the granting of the all-important "certificates of appropriateness" in order for development to occur. This should matter tremendously, no matter what a person's political leanings, because the opportunity for both political favors and political paybacks is immense.

Page 9-31: *"'Interior Architectural Features' mean the architectural character and general composition of a significant landmark interior, including the room design and configuration, color and texture of materials, and the type, pattern, and character of all architectural details and elements, including but not limited to staircases, doors, hardware, moldings, trims, plaster work, light fixtures, and wall coverings;"*

Comment: APA wants local governments to be able to tell someone whose property is a "significant landmark" (see definitions above) what their furniture will look like and how they can arrange it, what color they can paint their walls, what kind of wallpaper, if any,

they can put up, and potentially whether they can have a personal computer (because it may not be reflective of the era).

Page 9-32: *"Properties eligible for designation* [as historic landmarks] *shall possess integrity of location, design, setting, materials, workmanship, feeling and association; and: ... 3. embody the distinctive characteristics of a type, period or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction;"*

Comment: Setting aside the obviously juvenile lack of parallel construction in this list of items, this again is a very poorly written passage. If a building has an honest "feeling" of *any* era and uses the distinctive methods of construction of that era, it is eligible under this definition for a formal designation as a historic landmark. Under such a definition, nearly any well-designed or well-constructed building built at any time that is in any way typical of its time qualifies. The final phrase (*"or that represent a significant and distinguishable entity whose components may lack individual distinction;"*) reads as if any corporate structure, because it represents and entity made up of individuals who lack individual distinction, also would instantly qualify as a historic landmark on the day it was built.

Page 9-33: *"... at least one member of the* [the historic preservation and/or design review] *board shall have expertise or training in history, architecture, architectural history, archaeology, or land-use planning;"*

Comment: Under this definition, a historic preservation board or design review board could be made up of a group of people with no interest in, understanding of, or experience related to historic preservation or design review, but so long as one planner was on the board, it would be granted all the powers of the board.

Page 9-34: *"Design guidelines shall be prepared by the historic preservation board and/or design review board ..."*

Comment: This is precisely why the makeup of the board is so important. Using APA's poorly-written definitions, it is possible that a body of people, who may know absolutely nothing about what they are doing, and one planner, will create the design guidelines that will regulate virtually every piece of property and every activity conducted on or in that property within their jurisdiction.

Page 9-35: *"... a historic preservation board or design review board ... may prohibit or deny permission for development even though that development may be necessary for a permitted land use;"*

Comment: Again, this is why the makeup of the board matters. This incompetent group of people and one planner will be able to deny someone the ability to use his property in accordance with his absolute rights to use it.

Page 9-35: *"... a design review board could compel a fast-food chain to employ signage and building décor that are compatible with the design district but could not prohibit a restaurant from operating within the design-compliant building if restaurants are as-of-right in that use district. ... Care should be taken in the preparation of the land-use element of the comprehensive plan and the zoning ordinance to provide as-of-right uses in historic or design review districts that are compatible with the purposes and standards of the districts."*

Comment: APA is clearly trying to slip in a recommendation in favor of content control, or censorship. Additionally, it is recommending finding ways to block particular types of businesses in historic or design review districts so that complete control of the district's appearance may be maintained. They know all too well that if you write your regulations in a way that lets a McDonalds or some other national chain come in to the area, that chain has the money and clout to defend its First Amendment rights.

Page 9-36: *"This Section ... (b) shall not prevent the ordinary maintenance or repair of any exterior [or interior] architectural feature in a historic district, design review district, or historic landmark that does not involve a change in design, material, or appearance thereof;"*

Comment: Using APA's definitions of architectural features, historic districts, and historic landmarks, if the person who had the marine themed front yard that people found interesting to look at as they drove by decided to put in a lawn and plant some flowers, that person would have to go before the group of incompetent people and the planner and get a "certificate of appropriateness" that the new landscape would fit in with the desired character of the "historic district" in which the house was located. The owner of a truly historical building would have to go through the same cumbersome process in order to get approval to do remove a rotting tree, plant colorful annuals in the flower beds, replace rotting wood siding, or clean moss off the shingles (because doing so would improve – and thus "change" – the appearance).

Page 9-36: *"The [code enforcement agency], at the request of the historic preservation board or design review board, may order the owner or any other person with legal custody and control over the premises to correct defects or repairs to any building or contributing structure within a historic district or on a historic landmark, so that such properties are preserved and protected in accordance with the purpose of the historic preservation ordinance."*

Comment: The group of incompetents and the planner may call the dogs on anyone who owns a "historic building" or "historic landmark" or who is located in a "historic district" (see definitions above) if that person does not fix up his property as the incompetents and the planner have decided he ought.

Page 9-36: *"Some historic preservation ordinances specifically authorize a code enforcement agency to institute, perform, or complete the necessary remedial work to*

prevent deterioration or de facto demolition by neglect and impose a lien against the property for the expenses incurred. This power is included in Chapter 11 as a generally-available remedy for the local government when a landowner does not maintain or repair their property as required by land use regulations. Many communities also authorize the use of eminent domain as a means of protecting historic buildings from serious neglect, but such a grant is beyond the scope of the Legislative Guidebook."

Comment: If the owner of the property is either unable or unwilling to perform the maintenance or repairs as required by the group of incompetents and the planner, APA recommends the state commission the work itself and attach a lien on the property. The regulation does not set any limits on the expense or extent of the work the state may do on the property. Under this set of regulations, a group of cronies could get appointed to a historic preservation board, target a desirable piece of property owned by an elderly woman, order it to be fixed up knowing she could not afford to do the work, commission a contractor to fix it up no holds barred, and attach a lien on the property that is perhaps equal to or greater than the value of the property, in order that the group can take the property for public use without having to pay one dime in compensation to its rightful owner.

Take a closer look at the last sentence of the proposed regulation. Why in the balance of this document does APA feel free to advocate the transfer of development rights, which requires appraisal, and the purchase of conservation easements, which also requires appraisal, but not the use of eminent domain? Why is eminent domain really any different than those processes? The reason is because eminent domain outright requires just compensation. If you read APA's policy on amortization, you will see that "just compensation" is anathema to APA.

Transfer of Development Rights

Page 9-37: *"Transfer of Development Rights ... In TDR programs, a local or regional government that wishes to preserve land in an undeveloped or less-developed state may do so without payment of cash compensation if it is willing to accept higher densities or more intensive uses elsewhere."*

Comment: Keep that in mind. TDR programs are an attempt to avoid paying just compensation. A whole section, beginning on page 9-42, is dedicated to this point, and is titled *"Effectiveness of TDR Programs Against Takings Claims."*

Page 9-43: *"Even though courts have found that TDR can negate a takings claim, and must be considered in the analysis of whether there has been a taking, there can be other takings-related problems with TDR programs. For instance, courts look askance at artificially downzoning a receiving area – zoning that area for a use or density significantly lower than the surrounding areas so that the TDRs become necessary to have any economically-viable development in the receiving area."*

Comment: In other words, APA is saying, "We think it is a clever idea to downzone a receiving area before allowing TDRs to boost the density back up to realistic levels, and thus avoid compensation because the developer at the receiving area will pay it for you, but unfortunately the courts have figured this scheme out, so be prudent in how you try to apply it." This interpretation of the regulation is bolstered in later passages, as you will see.

Page 9-45: *"the fee structure of the TDR program is calculated to reduce the cost to small landowners of using TDRs."*

Comment: Apparently, APA sees nothing wrong with charging a fee before a property owner can get his "compensation" by selling his development rights – that is, if anyone happens to want to buy them. Even without a buyer, the development rights exist, but are not attached to any property; and the property exists, but may not be developed. In such a situation, APA feels nothing has been taken and no compensation is owed.

Page 9-46: *"Collier County, Florida. ... The Collier County TDR program has been somewhat of a success – 526 development rights, arising from 325 acres in the Zone, have been transferred since the program's inception. However, due mainly to the fact that existing zoning provides adequate density without purchasing TDRs, the program has been very rarely employed in the last 10 years or so. On the other hand, nine other south Florida counties ... have followed Collier's lead by enacting TDR ordinances."*

Comment: It is interesting that even though Collier County has had very few participants in its TDR scheme, APA would have us believe that nine other counties have been so inspired by it's success that they have decided to enact the same scheme themselves. Of course, no cite is given for this assertion. As to content of this passage, APA believes that existing zoning should not provide adequate density, or the TDR scheme will not work. You can see this even more clearly if you jump ahead a few pages:

Page 9-57: *The density or intensity of development permitted in the receiving area without TDRs is also important. If a receiving area, in order to encourage the transfer of development rights to the area, has so low an allowable density without TDRs that development in the area is not economically viable without the TDRs, claims of downzoning and takings are possible. Conversely, if the zoning of the receiving area allows development at market capacity without the TDRs, or other means of achieving density increases ... are readily available, there will be little demand for the TDRs and their market value will be diminished. To restate the issue, economically-viable use of parcels in the receiving area must be possible at the base zoning without using TDRs, but development of receiving parcels to the density the market is demanding should not be possible without employing TDRs – a balancing act, indeed."*

Comment: But one which APA believes is worth the effort in order to avoid paying compensation. This passage is a breathtaking admission on the part of APA that it is

attempting to manipulate property owners and developers in order to avoid paying just compensation for taking property.

Page 9-47: *"New York City, New York ... enacted the Landmarks Preservation Law. The Law creates a Landmarks Preservation Commission, which designates landmark buildings and districts after holding a hearing at which the owner has a right to participate;"*

Comment: This passage shows how little regard APA has for property rights. Apparently, APA believes due process means being allowed to participate in some way at a hearing before an unelected, unaccountable, probably politically hand-picked and incompetent commission, whose membership, by the way, might include a planner. Further in the passage extolling New York City's wonderful TDR program we learn that the development rights on property declared a landmark may only be transferred to a "property across the street or across a street intersection, subject to a restriction that the floor area of the receiving parcel may not be increased by more than 20 percent above its otherwise-zoned level," and "provided that the receiving lots are owned by the same person." Thus, New York City avoids compensation for taking property that is declared a landmark. If the owner owns adjacent property he may somewhat increase the development on that parcel (unless it, too, is part of the landmark), so no development right is lost. It isn't the city's fault if there is no available receiving parcel on which the owner may exercise his right to build.

Page 9-50: *"The Chicago Plan. ... The main benefit to the owner of the landmark comes from the tax effects of losing the development rights. ... the loss of development rights on the sending parcel greatly reduces the value of the property for the purpose of property tax assessments."*

Comment: This ignorance is shameful. Take an empty lot in Portland, Oregon, for example. A development restriction in 1990 reduced its value from $50,000 to $25,000, for a loss of $25,000. The property taxes, at $15 per $1000 of assessed value, dropped from $710 to $355 per year. After **seventy years**, the reduction in property taxes would finally equal the lost value, dollar for dollar. However, that does not take into account inflation, increasing property values, or lost interest earnings on the money, just for starters.

Page 9-50: *"Such a program was not implemented by the City of Chicago due to legal conservatism in City Hall under Mayor Richard J. Daley and in the legal community – the more traditional zoning/police power approach to protecting landmarks had been tried and judicially approved – and due to the fact that downtown developers could build to market intensities and densities under existing zoning or by employing incentives, and did not need to purchase TDRs."* [Footnote: *"Telephone interview, 10/7/98, with Jared Shlaes, Shlaes & Co., Chicago; Telephone interview, 10/12/98, with John Costonis."*] *"However, the adoption of elements of the Chicago Plan by the Illinois Legislature as an municipal historic preservation enabling act (see below), and in the TDR enabling*

statutes of new York State and Tennessee (also below) must be noted, so that the Chicago Plan was a model for action by others if not by the city for which it was intended."

Comment: The implementation of TDRs is a very complicated legal matter. To suggest Chicago's plan was a model for other TDR plans without some proof is pumping something that should not be pumped – if it were true, the footnotes would include a cite for the assertion, but APA has no authority to say what it has said here. Throughout this book APA cites telephone interviews as the basis for what it is recommending. No statistics or data are supplied; somebody just says, "I interviewed this person and he or she agreed with what I am saying." Telephone interviews are the most unreliable source for research because nobody else can get the data to double-check it. No responsible research group operates that way. It is probably dishonest. But over and over we are asked to accept APA's opinion without any data and without any cite. Occasionally APA is good enough to bless us with the assurance that an APA staff member made a phone call and certified his or her opinion with the other person's opinion.

I would simply point out that for a long period of time racism was supported by a group called "Environmental Determinists," whose assertions about race were purported to be endorsed by a number of prominent academics. When the leader of the Environmental Determinists' data was finally analyzed, however, it turned that he had written letters to people and said, "Don't you agree with my opinion?" Since they had not taken the time to dispute him, he quoted them as a fellow source. He was at least honest enough to write a letter to the person. I wonder whether the APA staff, before quoting anyone, wrote letters to them for verification of the substance of the conversation. This kind of Mickey-Mouse research does not belong in a federal police power document.

Page 9-57: *"the local government may wish to have a more direct role in the development rights market. It may wish to buy and sell development rights in order to stabilize the market, or it may wish to buy up development rights in order to preserve property from development in a non-regulatory manner."*

Comment: This little set-up will be wonderful for the bureaucrats, who will get to dabble in the real estate market, buying and selling development rights using someone else's money, and in the mean time preserving all that open space while avoiding payment of compensation for the full price of the lot, and avoiding the costs of maintaining the property. And don't forget – the rightful owner will have the wonderful benefit of paying less in property taxes, so everyone wins!

Page 9-58: *"The purposes of this Section are to: (a) preserve open space ..."*

Comment: Metro, the regional government for the Portland, Oregon metropolitan area, considers back yards, side yards, golf courses, cemeteries, church lawns, undeveloped lots, and other such areas to be "open space." APA's statement of purpose, then, is completely meaningless without thoughtfully written definitions of terms, including exceptions clearly listing what is not intended to be regulated.

Page 9-58: *"The purposes of this Section are to: (g) ensure that development rights are transferred to properties that are in areas or districts that have adequate community facilities."*

Comment: By this definition, development rights could not be transferred to an area unless the area *already* had "adequate" infrastructure in place, including parks, schools, police, fire, streets, sewer, water, utilities, etc. Someone (i.e. the taxpayers) would have to pay for all this infrastructure before the development could come in, because the definition says the development rights can only be transferred to districts that "have" adequate facilities.

Page 9-59: *"'Receiving Parcel' means a parcel of land in the receiving district that is the subject of a transfer of development rights ... on which increased density and/or intensity is allowed by reason of the transfer of development rights;"*

Comment: This definition refers to "increased density and/or intensity" as being the effect of the transfer of development rights. However, on the prior page, the definition of "development rights" refers to "a particular use" or "a particular area, density, bulk, or height." This incongruity in definitions clouds an understanding of the equivalence of the right being forfeited with the right being purchased. The sending property may give up a use that is not defined in terms of units of housing, while the receiving property's application of the right is specifically defined in that manner.

Page 9-60: *"The sending parcel shall be the servient estate and the local government shall be the holder of the easement, and the local government may specify one or more non-profit organizations to be additional holders of the easement."*

Comment: Now we begin to understand why so many non-profit groups have participated in the drafting of this document, including the National Trust for Historic Preservation, Defenders of Wildlife, natural Resources Defense Council, National Trust for Historic Preservation, National Wildlife Federation, Scenic America, Sierra Club, and others. These non-profit groups will have the opportunity to be named a holder of an easement on private property without having to pay a dime for that easement.

Page 9-62: *The local government may, by ordinance, establish a transfer of development rights bank ... operated by the [local planning agency] or by any other existing or new entity designated by the ordinance, including an agency of the local government, the [regional planning agency] or [state planning agency], or a non-profit organization."*

Comment: All of these property rights will be placed under the control of APA members and their non-profit friends (see list above). But it gets even more sinister:

Page 9-62: *"The TDR Bank shall have the power to recommend to the local legislative body properties where the local government should acquire development rights by condemnation."*

Comment: APA members and their environmentalist non-profit friends will be able to search out and recommend private property for condemnation and taking, utilizing the TDR scheme that avoids paying compensation. APA's commentary on this section reads, *"If the local government itself does not have the power under the state eminent domain enabling statute to condemn development rights or a conservation easement (which is the same thing), that statute* ***must*** *be amended to give the local government that power, so that it can then be delegated pursuant to this paragraph."*

Conservation Easements; Purchase of Development Rights

Page 9-64: *"... with political or legal roadblocks to a regulatory approach, local governments with the resources to do so may prefer to 'buy out' certain development rather than prohibit it."*

Comment: In other words, if the people do not want it, or it is against the law, you can still do it by buying out a partial development right and avoiding payment of full compensation, which will result in the same effect, *"making local government regulation more palatable to the affected landowners when their reaction is a serious political consideration."* Oh, the unabashed arrogance.

Page 9-69: *Purchase of Development Rights*

Comment: At first, when I read through this section, I was completely baffled as to why one of the most outstanding programs that was ever created in North America was not mentioned in the preceding text. In the 1970s the US Fish & Wildlife Service received its first legislative enactment to purchase wildlife or development right easements. Although it has been implemented all over the US now, its initial implementation was in the central valley of California in what was formerly the 500,000 acre great inland marsh. Fish & Wildlife began to reconstruct the marsh from a core of 50,000 private acres and some nearly 50,000 public acres. In order to complete the task, it needed to acquire the development rights on the farmland that was being used for "duck clubs," or migratory bird winter habitat.

Ducks Unlimited had been building back the prairie pothole system, dams and habitat along the various migratory bird flyways in North America for years; hence, the Fish & Wildlife effort was really the adaptation of a private model into a national resource system. Eventually, Fish & Wildlife determined where it needed to add new refuges and expanded a national wildlife refuge in an urban area, Tualatin National Wildlife Refuge in Oregon. None of these efforts are mentioned in the Legislative Guidebook, and I believe they are not mentioned for a very simple reason. First, they were managed by professionals who do not operate under the nonsense of rational relationships. They are truly biologists and ecologists, with legitimate work experience in habitat management. Second, these professionals know full well their primary task is to build wildlife areas that are good for fish and wildlife, not to come up with phony set-aside reasons to create parks and walking areas that they don't pay for.

For example, in the Tualatin National Wildlife Refuge, Fish & Wildlife immediately had a dispute with Metro, the regional government, which wanted to take part of the refuge away to develop into night tennis courts. The professionals at Fish & Wildlife readily recognized the confusion that would have been created for migratory birds if those courts were lit at night, inducing them to land on them and damage themselves. Metro was so displeased about Fish & Wildlife telling it "no," that the area was truly an environmental area that could not be used for recreation that would harm fish and wildlife, that Metro withheld all its funds from attempts to purchase additional refuge land.

In short, I believe these programs were not mentioned because the planning community, particularly people like those running Metro, who are clearly cited and referenced throughout this Legislative Guidebook, understands thoroughly that when you start really developing compensated, goal-oriented, functional wildlife areas, you stop the ability of planners and their friends to collaterally attack the American lifestyle and growth.

Page 9-71, 72: *"A purchase of development rights agreement may require that the conservation easement ... name one or more non-profit organizations as additional holders of the easement."*

Comment: This was discussed earlier, along with a list of APA's non-profit friends who helped write the Legislative Guidebook. Following this passage is a note by APA: *"There are non-profit organizations, such as land trusts, that have as their primary mission the protection of land and the preservation of the important resources thereon. The inclusion of such organizations as easement holders can be a valuable addition to a PDR program."* The types of organizations APA is specifically looking to have added to conservation easements are the types listed as participating in the writing of the book.

Page 9-72: *"Any instrument purporting to convey a conservation easement pursuant to this Section but that the local government has not indicated its approval on the instrument is void, and shall not be recorded or accepted ..."*

Comment: The sentence structure in here is so poor it is difficult to follow the meaning of the sentence.

Page 9-72: *"The purposes ... of a conservation easement are to: (b) conserve agriculture and forestry uses of land;"*

Comment: The use of a conservation easement for agricultural land, with the happy-go-lucky attitude that the influx of cash from the purchase of the development rights on the land will help the farmer, is naive at best. The farmer who does not have property that can produce a marketable product at a sustainable level may be temporarily helped by the sale of his development rights, but eventually the money will be spent and he will still own land that cannot be economically farmed. Now, however, his problems are much worse. He cannot sell the property to a developer or develop it himself because it has a

conservation easement which, by the way, is partially owned by some environmentalist non-profit organization.

Page 9-72, 73: *"'Conservation Easement' ... limitations or obligations may include ... constructing or placing ... signs, billboards or other advertising ...or other structures on or above the ground;"*

Comment: Under this policy, the process APA touts as a protection for the environment would be used to force a business to operate without a sign, and would empty the public treasury buying up the rights to erect a billboard, any other type of advertisement, or cell phone tower on every property on which it was possible to do so, whether or not the market would have made that a reality. Additionally, the struggling farmer who cannot sell or develop his unproductive farm will be prohibited from earning any income by allowing a billboard or cell phone tower to be erected on his property, even though doing so would not inhibit the property's ability to be farmed or harm the environment.

Page 9-72, 73: *"'Conservation Easement' ... limitations or obligations may include ...removing ... gravel, soil, rock, or other material substance in such manner as to affect the surface;"*

Comment: This kind of regulation will allow the pet non-profit organizations to buy up all manner of mining (and other development) rights and hold them for later use if desired, creating a wonderful unmet demand for the products which only the non-profit can provide, and then cashing in on the artificially created demand by selling the rights at an inflated price, or buying the rights-stripped property at a deflated price and returning the development rights to the property for resale at an inflated price. So long as the non-profit's stated purpose *"includes"* (but is not limited to): *"protecting natural, scenic, or open space values of real property, assuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving sites or properties of historical, architectural, archaeological, or cultural significance,"* it may be party to a conservation easement, with all the rights involved in ownership of that easement. And it may release or terminate the easement if a court finds there has been *"a change or changes in circumstance since the creation of the conservation easement"* that *"has rendered the particular purpose of purposes of the conservation easement impracticable; and the modification, release, or termination is consistent with a specific goal, policy, or provision in the local comprehensive plan."* The latter should be particularly easy; the property was zoned according to the comprehensive plan at the time the easement was created, and releasing the easement will simply put the property back in line with the comprehensive plan. Regulations on Page 9-76 bolster this possibility, by specifically allowing the owner of the conservation easement to release the easement back to the property owner *"even though the owner of the servient estate may not be eligible to be a holder"* of a conservation easement.

Page 9-76: *"A holder of a conservation easement may enter upon the servient estate in a reasonable manner and at reasonable times to assure compliance with the conservation easement."*

Comment: This is the most egregious part of the entire business so far. It specifically grants access for a non-profit environmentalist organization onto private property to check up on the owner at will. But believe it or not, the potential for abuse gets even worse:

Mitigation

Page 9-77: *"Mitigation can involve either creating critical and sensitive areas from land that was never critical and sensitive, or restoring land that was once a critical and sensitive area to that former condition. Also, mitigation can involve the developer creating or restoring such areas on his or her own land or, alternatively, obtaining land (or rights to land) that has been converted to a critical and sensitive area by another person or organization."* AND
Page 9-82: "Mitigation measures may be prepared by the developer directly, the developer may purchase land that consists of created critical and sensitive areas, or the developer may receive credit for such created land while it remains in the ownership or responsibility of another. This last option may be exercised by the developer obtaining a conservation easement over the created area, so that it cannot be developed..."

Comment: In other words, you can gain approval for development on your critical and sensitive property, provided you give what amounts to a donation to one of APA's environmentalist non-profit friends which just happens to own a conservation easement on someone else's property (which it did not have to pay for because its name was put on the easement by the local government, but it would be happy to sell to you), or has restored some other environmentally critical and sensitive property on its own and would be happy to make up a conservation easement for it that you could buy or sell it to you outright. It is all a great fundraising mechanism for APA's nonprofit friends.

Page 9-77: *"The key issue in mitigation is equivalency: whether the created critical and sensitive area is roughly equal in size and quality to the area that is to be developed. The goal of mitigation is the preservation of critical and sensitive areas; if a developer could legally build on 100 acres of high-quality wetland by creating 100 acres of lower-quality wetland, then there would be a net loss in wetland habitat. Since such areas must be defined in the first place, these definitions are the clear starting place for creating standards for comparing created and destroyed critical and sensitive areas. But merely providing substitute land that meets the definition of a critical and sensitive area is not enough: 100 acres of low-quality wetland is still wetland according to the legal definition, but is not equivalent to 100 acres of high-quality wetland. Therefore, more detailed standards and criteria for comparing one critical and sensitive area to another are necessary."*

Comment: All of the worst suspicions about why APA does not mention the true state of federal law on conservation, preservation, wildlife preservation, and mitigation comes across here. Anyone who has followed the history of the Corps of Engineers knows that the real purpose behind most of the federal efforts has been to get enough money to buy areas that can be used for wildlife preservation and habitat. Equivalency has never been a goal anyplace. If you are intend to build a wildlife habitat area, you have to build the *area*. You don't simply go out and put a tiny refuge of a certain number of acres in the middle of or next to the highway, although certain APA members recommend it without realizing those are death traps for the wildlife. Equivalency with the US Corps of Engineers and the US Fish & Wildlife Service has always meant establishing *areas* of land use that will be dominated by the fish and wildlife. It is a very simple concept, but it is clear that either APA does not understand it or they got mixed up in writing this passage.

Page 9-83: *"'Mitigation' means the substitution of critical and sensitive areas created from land that did not constitute critical and sensitive areas for critical and sensitive areas that are proposed to be subject to development and that, as a result of the development, will not constitute critical and sensitive areas."*

Comment: Traditionally, mitigation has meant making up for, fixing, or in some way compensating for damage done in the process of development. For example, if a development would mean a large tree would be removed, mitigation might involve the planting of five young trees to offset the damage. Or if construction would occur near a creek, erosion control and plantings of native plants would be required. But APA has moved the concept of mitigation to a whole new level. It is as if APA no longer cares about on-site mitigation. All emphasis now is on creating entire new areas that are "critical" and "sensitive" in the place of areas that used to be "critical" and "sensitive." And as many landowners can attest, the "wetlands" and "watershed" definitions have been so broadly interpreted (in Portland, if a creek that is dry for 11 months out of the year is on your property, it is a "stream" and nearly all development within 50 feet of it is prohibited) that this opens the door to a greater amount of confiscatory behavior, exacerbated by APA's non-profit friends who can now manipulate the process for their own financial gain with the new conservation easement system.

Page 9-86: *"If a local government adopts mitigation standards that are inconsistent with those adopted by the [state EPA], then any purported mitigation ordinance of that local government is void.*

Comment: This is blatant top-down management of local land use management.

Land-Use Incentives for Affordable Housing, Community Design, and Open Space Dedication

Page 9-88: *"Many new plans and land development regulations now subscribe to the principles of smart growth, which include using land resources more efficiently through*

compact building forms and infill development; mixing land uses, promoting a variety of housing choices, supporting walking, cycling, and transit as attractive alternatives to driving, improving the development review process and development standards so that developers are encouraged to apply the smart growth principles, and connecting infrastructure planning to development decisions to maximize use of existing facilities and ensure that infrastructure is in place to serve the new development. Smart growth, in effecting a more rational use of existing developed land and buildings, effects the preservation of natural, scenic, and historic resources."

Comment: That is an extremely bold statement and it is absolutely not factual. APA's smart growth regulations make it nearly impossible to renovate old buildings, nearly impossible to develop a communication system that works, and go further than almost any effort has ever gone in bringing about discriminatory behavior against the small businesses that would be able to renovate and use existing buildings. APA accuses its opponents of being sound bite experts at the expense of fact, but APA is the king of the sound bite experts, and offers no data other than an occasional unsubstantiated phone call to someone to support its point of view.

Page 9-89: *"Additionally, setback, height, and bulk standards are often allowed to be modified to accommodate the added density or, in the case of affordable housing, to reduce development costs. Waivers of specific regulatory requirements or fees – such as parking standards or impact fees – are also used as an incentive for a developer to provide various amenities."*

Comment: This sort of approach is an open license to complete and total corruption. It allows those who have money available for political campaign contributions, with friends in high places, or with the ability to do favors to get whatever they want out of the development process, while the least franchised – small businesses, women-owned business, minority-owned businesses, individual property owners, or people not politically aligned with the prevailing point of view – can face incredible hurdles in the process. It defies the entire concept of equal treatment.

Page 9-89: *"Some programs – particularly those that include affordable housing as a bonusable amenity – allow developers may pay cash in lieu of building or supplying the amenity for which the incentive is being provided."*

Comment: Not only does this sentence contain a glaring grammatical error, it also is a blatant demonstration of the ability of the wealthy to buy their way through the permit process while others are forced to comply.

Page 9-91: *"The purpose of the Special Midtown District, for example, which was enacted in 1980 is to encourage intensives development in some subdistricts such as Times Square, ... The same basic types of amenities are provided in special districts exchange for increased floor area, but the exact requirements and design guidelines are specific to each special districts and even further refined within subdistricts. Moreover, some of the special district also apply transfer of development rights ..."*

Comment: "...intensives development..."? "...in special districts exchange for..."? "...each special districts..."? "...some of the special district..."? Was the proofreader on vacation?

Page 9-91: *"Citing a shortage of housing for low- and moderate-income families and ever-increasing housing costs brought on in part by local government permitting processes and land-use regulations, California enacted legislation in 1979 requiring local governments to ..."*

Comment: In other words, the planners screwed things up so badly that low- and moderate-income families could no longer afford to live there, so rather than remove the land use restrictions that caused the problem, they came up with another set of regulations to force the wealthy to subsidize everyone else's housing costs.

Page 9-92: *"Such a requirement provides no opportunity for equity recapture on the part of first-time home buyers. Thus, says Linda Wheaton, a housing policy specialist with the State of California Department of Housing and Community Development, the need for housing developments that receive bonuses to remain affordable is not reconciled with overarching goals helping families build equity and financial stability through home ownership. In terms of concessions, Wheaton says the most common waiver offered by local governments and sought out by developers is the reduction in parking requirements. ... the law enables local governments participating in a demonstration program to grant a density bonus of at least 25 percent of the maximum permitted residential density to developers of housing within one-half mile of a mass transit station. According to Linda Wheaton the latter provision is rarely used, most likely because of the lack of an associated funding source to build housing in these areas."*

Comment: Are we to accept that if Linda Wheaton said it, it must be true? The fact that the footnotes refer to the exact date of the conversation that APA's Marya Morris had with Ms. Wheaton lends no credibility to the legitimacy of Ms. Wheaton's opinions. Apparently, APA believes that the gathering of statistics and provable data is an unnecessary waste of time, especially when a housing policy specialist can tell you an opinion over the telephone. On the basis of a phone call and the receipt of an opinion, APA is ready to create and apply land use regulations across the entire country.

Page 9-92: *"Such an agreement would stipulate the exact terms of the bonuses the developer should receive and the incentives and concession made by the local government. Finally, the law directs courts to uphold the decision of a city or county to grant the density bonus if it finds that there evidence that ..."*

Comment: More typographical errors. "incentives and concession" and "that there evidence that..."

Page 9-93: *"The transit village act enables cities and counties to prepare a transit village plan that addresses the following characteristics: (a) A neighborhood centered*

around a transit station that is planned and designed so that residents, workers, shoppers, and others find it convenient and attractive to patronize transit."

Comment: It is high time APA faced the facts. We know based on quantifiable research that per capita those who live in transit-oriented neighborhoods and so-called "transit villages" are no more likely to use transit than the general population.

Page 9-93: *"(d) Demonstrable public benefits beyond the increase in transit usage, including all of the following: (1) Relief of traffic congestion. (2) Improved air quality. (3) Increased transit revenue yields. ... (9) Reduction of the need for additional travel by providing for the sale of goods and services at transit stations. ... (13) Reduction in energy consumption."*

Comment: No statistically sound data has ever been produced that could demonstrate in any reliable way that any of these benefits flow from transit usage. Light rail transit, for example, has never been shown to relieve traffic congestion. Much study has gone into determining whether air quality and energy consumption are improved with transit, and the results were statistically insignificant. Transit revenues, adjusted for inflation and other normal factors, are not increasing, but transit subsidies are. Finally, the variety of goods available at a typical transit stop is insufficient for most consumers – and the inability of these shops to take advantage of economies of scale, as big box retail does, would create an irresistible incentive for consumers to get off the train, hop into their cars and drive elsewhere to shop.

Page 9-96: *"Oregon's statutes implementing urban growth boundaries enable local governments to undertake 'actions or measures to ensure that adequate levels of residential development are achieved withing* (sic) *urban growth boundaries.' ..."*

Comment: Setting aside the spelling error, a description of basic statutes follows the paragraph, but no mention is made of whether or not the statutes are accomplishing their goals. This is because they are not successful. In fact, in each of the examples listed throughout this section, from a number of different states, nothing is said about the effectiveness of the regulations. Apparently, all APA cares about is that they are trying really hard.

Page 9-97: *"The San Jose 2020 General Plan has several mechanisms built in to encourage housing development. Adopted in 1994, it is the city's first modern plan that meets the various requirements of state law, if not the exact letter of the law. To start, the plan designates a substantial amount of land for housing development. Further it contains 'Discretionary Alternate Use Policies' which allow various commercial or industrial sites to be redeveloped as housing at the discretion of the city council."*

Comment: Again, this kind of discretionary authority leads to problems with corruption; developments can be blocked for political reasons, or ill-conceived developments allowed because the developer is wealthy, politically connected, or able to do a favor for someone.

Page 9-98: *"'Affordable Housing' means housing that has a sales price or rental amount that is within the means of a household that may occupy moderate- or low-income housing. ..."*

Comment: What in the world does that mean? Had they said the amount it sells or rents for must fall within the means of the average moderate- or low-income household, it would have made sense, but instead it must be affordable to a household that occupies a particular kind of housing. A person is not of moderate-income simply because that person lives in moderate-income housing. But at least they define for us where they draw the income-level line on the housing – or do they?:

Page 9-98: *"... In the case of dwelling units for sale, housing that is affordable means housing in which annual housing costs constitute no more than [28] percent of such gross annual household income for a household of the size which may occupy the unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the affordable rent is no more than [30] percent of such gross annual household income for a household of the size which may occupy the unit in question."*

Comment: Affordable housing means the housing is "affordable" so long as it does not cost more than a certain percentage of the household's income – that makes sense – but what is this business of "...household of the size which may occupy..."? And why can renters afford more expensive housing than homebuyers?

Page 9-98: *"'Affordable Housing Development' means any housing development that is subsidized by the federal, state, or local government, or ..."*

Comment: In other words, if the government helps pay for it, suddenly it becomes "affordable," whether or not it actually *is* affordable.

Page 9-99: *"'Affordable Rent' means monthly housing expenses, including a reasonable allowance for utilities, for affordable housing units that are for rent to low- or moderate-income households."*

Comment: This is quite the deal, having utilities thrown in with rent and falling under government price restrictions. I have to assume, then, that if you have an "affordable housing unit" for rent, and the rent is controlled by covenant, and the utility costs go up dramatically (as they have done in the last year), your income will drop dramatically. You, as the landlord, will be forced to swallow the costs of the increased electric and gas bill for your "low- or moderate-income" tenant. That is, unless you are subsidized by the government, because in that case the subsidy itself makes the unit "affordable," not the actual rent charged, according to APA's definitions.

Page 9-99: *"'Density Bonus' means the percentage of density increase granted over the otherwise maximum allowable net density under the applicable zoning ordinance ... The*

density bonus applicable to affordable housing shall be at least a 25 percent increase, and shall apply to the site of the affordable housing development."

Comment: Because the language requires at least a 25% increase in density, and later in the chapter a certain percentage of affordable housing units overall is required, this passage appears to *require* as much as a 25% increase in density over that anticipated by the adopted comprehensive land use plan.

Page 9-99: *"'Development Incentives' means any of the following: 1. reductions in building setback requirements; 2. reductions or waivers if impact fees, application fees for development permits, utility tap-in fees, or other dedications or exactions; 3. reductions in minimum lot area, width, or depth; ... 8. reductions or waivers of public or nonpublic improvements; ... other incentives proposed by the developer of an affordable housing project or by the local government that result in identifiable cost reductions for affordable housing, including direct financial aid by the local government in the form of a loan or grant to subsidize or provide low interest financing for on- or off-site improvements, land, or construction costs."*

Comment: In plain English, "Development Incentives" means allowing a developer to break the rules everyone else must follow, or not pay the taxes and fees everyone else must pay, or giving the developer money, low interest financing, or some nice infrastructure improvements to the area around the development in exchange for the developer's building of 25% more housing units than allowed by law and renting of 20% of them to low-income people under a system of rent control, while collecting government subsidies for that rent-control program. In the mean time, the general public will be forced to make up the cost of the taxes the developer will not have to pay, make up for the fact that the development will not be required to pay its own way in terms of infrastructure, subsidize the development itself, and subsidize several years worth of renters' housing costs.

Portland is home to a shining example of a mixed use, affordable housing development, known as Belmont Dairy. Local government poured all it could into this project, in order to create a "business model for mixed use" (according to its own web site). Belmont Dairy was a 70 year old dairy building that was converted to a mixed use development with 81 housing units and several shops. Twenty of the housing units are lofts renting for $869 a month. The remaining 61 units are "affordable housing" ranging in price from $470 to $581 a month. Renovation costs totaled $12,585,098 ($155,371.58 per unit – more than the cost of the average single family home in Portland at the time it was constructed). Funding sources included: a $30,000 grant from CMAQ, a $5,429,228 loan from the National Office of Affordable Housing, a $1,250,000 grant from the City of Portland, $1,011,477 from the developer, low income tax credits of $4,494,393, and low interest financing from Oregon Housing and Community Services Department. I wonder which group would have had the greatest political pull if the local Historic Preservation Board had felt the modifications to the historic building were out of character with the building's design and history and tried to block the smart growth and affordable housing advocates from renovating it.

Page 9-101: *"'Moderate-Income Housing' means housing that is affordable ...for occupancy by households with a gross household income that is greater than 50 percent but does not exceed 80 percent of the median gross household income for households of the same size within the housing region ... "*

Comment: Keep in mind that "moderate-income" is being defined as 50% to 80% of moderate income.

Page 9-104: *"An affordable housing incentives ordinance or a unified incentives ordinance may require that any new housing development within the jurisdiction of the local government contain at least [15] percent affordable housing ... The incentives offered to the developer ... shall be of at least equivalent financial value to the cost ... "*

Comment: In other words, the local government will say to the developer, "you must build these affordable housing units, and we are authorized to give you more than necessary to buy you off on it."

Page 9-104: *"Where a developer proposes a housing development that is to be an affordable housing development, the local government shall either: (a) grant a density bonus and at least one development incentive, unless the local government makes a written finding that the development incentive is not necessary ... "*

Comment: In other words, if the affordable housing is the developer's idea, the developer will get nothing, but if the developer pretends he is not interested in creating affordable housing, he can wrench all kinds of goodies out of the local government, including lower taxes and government subsidies.

The affordable housing section overall raises some questions it never answers. What happens if a renter who was low-income breaks out of poverty and becomes a moderate- or high-income person (it does happen)? Does the house or apartment no longer qualify as "affordable housing" even though the housing and the rent charged stay the same? Does the government subsidy for the housing unit cease? Does the renter lose his or her apartment or house? Will somebody be monitoring tenants' income to make sure they stay at the poverty level or get kicked out? What about sub-letting apartments or houses, as happens in the rent-control areas of New York? Since the agreement between the government and the developer will require controlled rents (and utilities) for a set period of years, what happens at the end of that time? If tenants are still low-income, will they suddenly become homeless because they cannot afford the market rate on the unit in which they have lived for the past 15 years? Will low-income tenants be allowed to vote on property tax levies, since they will not have to pay higher rents if the taxes pass? What happens to the landlord if property taxes increase dramatically as they did in Portland, going up as much as 120% in one year in some neighborhoods? Or will that excess cost be absorbed by the local government in the form of a government subsidy and passed on to other property owners?

Overall, the message of this affordable housing section is that smart growth principles, where they have been applied, have made housing more expensive. The solution APA offers is to create a heavy-handed, politically manipulatable affordable housing program, fed with taxpayer funds (rather than funded by developers) in order to house nearly half of the population (everyone up to 80% of median income) in taxpayer-subsidized housing. It is a system based on redistribution of the wealth, by taking from those who have and giving it to those who do not. It is certainly not based on the American free-market, capitalist system, where a strong economy lifts all boats. Additionally, the system requires a landlord or homeowner to discriminate against an identifiable group of renters or buyers solely because of their income.